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8626
No. 12496

United States
Court of Appeals
for the Ninth Circuit.

OSCAR R. EWING, Federal Security Admin-
istrator,

Appellant,

VS.

MARY R. BAIOCCHI,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

MAY 23 1950

PAUL P. O'BRIEN,

No. 12496

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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San Jose, California.

Attorney for Plaintiff and Appellee.

In the District Court of the United States for the
Northern District of California, Southern Division.

Civil No. 28187-H

MARY R. BAIOCCHI,

Plaintiff,

vs.

OSCAR R. EWING, FEDERAL SECURITY
ADMINISTRATOR,

Defendant.

COMPLAINT FOR REVIEW OF DECISION
OF SOCIAL SECURITY ADMINISTRATION

Plaintiff complains of defendant and for cause
of action alleges:

I.

This action is brought under the provisions of
Sections 202 to 209, both inclusive, of the Social
Security Act, as amended. (U.S.C.A., Title 42, Sec-
tions 402 to 409, inc.)

II.

Plaintiff is now and at all times herein mentioned
has been a resident of the County of Santa Clara,
State of California, and of the Southern Division
of the Northern District of California. She is
the widow of Almando Baiocchi, who died July 8,
1945, at the age of 51, and she is the mother of
his children, Leola D. Baiocchi and Geraldine
Baiocchi, both under 18 years of age at the time
of their father's death.

III.

At all times herein mentioned, the Federal Security Agency was and now is an agency of the United States, and defendant Oscar R. Ewing was and now is the duly appointed, qualified and acting Director of the said agency and the Social Security Administration was and now is a division of the said Federal Security Agency.

IV.

California Prune and Apricot Growers Association is and was at all times herein mentioned a non-profit, co-operative marketing association organized under the laws of the State of California, engaged in the commercial business of buying from farmers and grading, fumigating, processing and packing dried prunes, peaches, apricots, apricot pits and nectarines, in approximately that order of importance or volume, and selling the graded, processed, fumigated and packed dried prunes, peaches, apricots, apricot pits and nectarines in the open market. At no time herein mentioned has the California Prune and Apricot Growers Association owned, leased or operated any ranch or farm, or cultivated the soil, or raised or produced or harvested any such dried fruits, or graded, fumigated, processed or packed any such dried fruits as an incident to farming operations.

V.

Plaintiff's deceased husband, Almando Baiocchi, was employed by and worked for the California Prune and Apricot Growers Association from the latter part of 1939 to and including November 4, 1944, as a packing house worker engaged in processing and packing, receiving, grading and shipping dried fruit purchased and owned by the said California Prune and Apricot Growers Association. He did not at any time herein mentioned work on, or in connection with any farm or ranch, or cultivate soil or raise, produce or harvest any such fruit, or do any work incident to ordinary farming operations and performed all of said work after delivery of the said dried fruit to the grower's market and to a terminal market for distribution for consumption. The large industrial plant at which he performed all of his work is located within the city limits of San Jose, California, and but a few blocks from the heart of the said city, in an area zoned as heavy industrial.

VI.

During the entire period of his said employment the plaintiff's deceased husband rendered services as a dried fruit packing house worker, which earned him wages, over and above any incidental maintenance work he performed, in excess of \$45.00 per quarter during each and every quarter of the said period, all of which wages were duly reported quarterly by his employer to the Federal Govern-

ment and all Federal social security taxes were paid thereon.

VII.

Plaintiff did on July 19, 1945, eleven days after her husband's death, file with the Social Security Administration a written application on her own behalf as the widow of the deceased wage earner and on behalf of her two said daughters, both under 18 years of age at the time, asking for widow's current insurance benefits and minor children's benefits under the Social Security Act, as amended in 1939.

VIII.

On March 26, 1948, the said Social Security Administration of the Federal Security Agency, of which the defendant is the Administrator, made its decision upon said application and upon a request for reconsideration dated November 8, 1947, denying the said widow and minor children any benefits under the Social Security Act, as amended, upon the ground that there were not sufficient quarters of coverage because the services rendered by the deceased wage earner after January 1, 1940, were agricultural labor, even though the services rendered prior thereto were found to have been earned in covered employment.

IX.

Plaintiff on May 4, 1948, filed with the Social Security Administration a formal Request for Hearing before a Referee, which hearing was held

at San Jose California, on May 26, 1948, and at which hearing the plaintiff offered and introduced evidence in support of her application and objections to the decision denying awards. Thereafter, on June 8, 1948, the Referee who heard the matter rendered his decision reaffirming the denial of awards. A Request for Review of the Referee's decision was thereupon filed by the plaintiff with the Appeals Council of the said Social Security Administration at Washington, D. C., which Council on June 29, 1948, denied the said Request for Review. Notice of said denial was mailed to the plaintiff on June 29, 1948, with 60 days allowed in which to file civil action in the above-entitled Court for Court review of the matter. This action is begun within the said time limit.

X.

The services rendered by plaintiff's deceased husband for the California Prune and Apricot Growers Association after January 1, 1940, were in their nature identical to the services rendered by him prior to January 1, 1940, and were not agricultural labor under the provisions of the Social Security Act, as amended in 1939, and plaintiff is entitled to insurance benefits thereon for herself and two minor daughters for each month in which they themselves did not earn \$15.00 or over in covered employment.

XI.

This suit is brought by plaintiff through her attorney for the specific purpose of establishing as a result of *stare decisis* the legal and equitable claims of plaintiff and all persons similarly situated against those funds available to the defendant for their payment under the provisions of the Social Security Act, as amended in 1939. Therefore, plaintiff's counsel requests this Honorable Court to order an equitable lien against the fund established or preserved as a result of this suit for the reasonable value of the services of the plaintiff's attorney as determined by this Court, or by appellate courts should an appeal be taken.

Wherefore, plaintiff prays that this Court review the proceedings, findings and decisions of the said Social Security Administration in this matter and enter its judgment herein ordering the defendant Federal Security Administrator to award plaintiff insurance benefits under the Social Security Act, as amended in 1939, based upon all the wages earned by the plaintiff's deceased husband during the entire period from January 1, 1940, to November 4, 1944, inclusive; that a fund be ordered established or preserved by this Court to pay said claims and the claims of persons similarly situated; that the Court grant to the plaintiff such other and further relief as the Court may deem appropriate and equitable; and that the Court grant to plaintiff's attorney a reasonable attorney's fee, as determined by this Court or by appellate courts should an appeal be taken, and an equitable lien therefor on and

at San Jose California, on May 26, 1948, and at which hearing the plaintiff offered and introduced evidence in support of her application and objections to the decision denying awards. Thereafter, on June 8, 1948, the Referee who heard the matter rendered his decision reaffirming the denial of awards. A Request for Review of the Referee's decision was thereupon filed by the plaintiff with the Appeals Council of the said Social Security Administration at Washington, D. C., which Council on June 29, 1948, denied the said Request for Review. Notice of said denial was mailed to the plaintiff on June 29, 1948, with 60 days allowed in which to file civil action in the above-entitled Court for Court review of the matter. This action is begun within the said time limit.

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out of the fund established or preserved for the plaintiff and each of the employees and former employees of the California Prune and Apricot Growers Association (including their dependents), and other persons similarly situated, on whose behalf she brings this test suit, a decision in which will be stare decisis for all of the said employees, their dependents, and all other persons similarly situated.

/s/ ARTHUR L. JOHNSON,
Attorney for Plaintiff.

State of California,
County of Santa Clara—ss.

Mary R. Baiocchi, being first duly sworn, deposes and says that she is the plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof; and that same is true of her own knowledge except as to matters therein stated on information and belief and as to those matters she believes it to be true.

/s/ MARY R. BAIOCCHI,
Plaintiff.

Subscribed and sworn to before me this 14th day of July, 1948.

[Seal] /s/ FRANK S. BARRETT,
Notary Public in and for the County of Santa Clara, State of California.

My Commission Expires March 25, 1951.

[Endorsed]: Filed July 15, 1948.

[Title of District Court and Cause.]

ANSWER

Defendant Oscar R. Ewing, Federal Security Administrator, an officer of the United States, by Frank J. Hennessy, United States Attorney, answers the complaint herein as follows:

First Defense

1. Defendant denies the allegations of paragraph I of the complaint except to the extent admitted in the Fourth Defense herein, paragraph 9 of this answer.

2. Defendant admits the allegations of paragraphs II and III of the complaint except that he says that he is the Administrator of the Federal Security Agency and not its Director.

3. Answering paragraphs IV, V and VI of the complaint, defendant refers to the findings of fact of the Social Security Administration contained in the transcript of the record filed herewith as part of this answer as establishing the facts on which this action to review is based, and except as herein admitted denies each and every allegation in said paragraphs IV, V and VI. He specifically denies that the deceased Almando Baiocchi earned "wages" in covered employment after December 31, 1939, within the purview of Title II of the Social Security Act as amended and that he performed all or any of his work after delivery of the dried fruit

to the grower's market and to a terminal market for distribution for consumption.

4. Defendant admits the allegations in paragraphs VII, VIII and IX of the complaint.

5. Defendant denies the allegations in paragraph X of the complaint that the services rendered after January 1, 1940, were not agricultural labor as defined in the Social Security Act as amended and that plaintiff is entitled to insurance benefits.

6. Answering paragraph XI of the complaint, defendant incorporates by reference the Fourth and Fifth Defenses hereto as though set forth in full herein.

Second Defense

7. Plaintiff has no claim upon which relief may be granted, as shown by the provisions of the Social Security Act as amended; the Regulations of the Social Security Administration promulgated thereunder; the transcript of the record upon which the decision complained of was made; and the findings and conclusions of the Social Security Administration.

Third Defense

8. The services performed by deceased Almando Baiocchi after December 31, 1939, were for a co-operative marketing the fruit as agent for the producers, who retained an economic interest until the entire seasonal pack was sold, and not on its own account. Accordingly the said services were in agri-

cultural labor, and not in employment as defined in 42 U.S.C. 409(b), (1), and the payments received therefor were not wages giving rise to quarters of coverage. The facts as found by the Social Security Administration so show; the findings are supported by substantial evidence and are conclusive.

Fourth Defense

9. The court is without jurisdiction of any class suit, or to grant any of the relief prayed for with respect to persons other than plaintiff Mary R. Baiocchi. It may only review the decision of the Referee issued June 8, 1948, constituting the final decision of the Federal Security Administrator, and enter a "judgment affirming, modifying, or reversing the decision * * * " 42 U.S.C. 405(g), in so far as the rights and interests of the named plaintiff are affected. 42 U.S.C. 405(h) providing that "No findings of fact or decision of the Administrator shall be reviewed by any person, tribunal, or governmental agency, except as herein provided," precludes maintenance of a class suit on behalf of persons not parties to the administrative proceeding.

10. Under the express provisions of Section 202 of Title II of the Social Security Act, 42 U.S.C. 402, one of the prescribed conditions for establishing entitlement to benefits under Title II is that the individual claiming such benefits must file an application therefor.

11. 42 U.S.C. 405(b) provides:

"The Administrator is directed to make findings

of fact, and decisions as to the rights of any individual applying for a payment under this title. Whenever requested by any such individual or whenever requested by a wife, widow, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Administrator has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his finding of fact and such decision * * *

The court has no jurisdiction to pass upon the rights of an individual who has not filed an application for payment of benefits under Title II or who has not been a party to a hearing with respect to wage credits, or who is not the wife, widow, child, or parent of such individual.

12. 42 U.S.C. 405(g), further providing that "Any individual, after any final decision of the Administrator made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action" limits review to complaints filed by individuals who were parties to proceedings before the Social Security Administration and who have exhausted their administrative remedies, including the administrative hearing provided for by 42 U.S.C. Section 405(b), in accordance with the procedures provided for in Subpart G of Social Security Administration Regulations No. 3.

The only party claiming benefits at the said administrative hearing was plaintiff Mary R. Baiocchi.

Fifth Defense

13. The authorization for suit, 42 U.S.C. 405(g), consents only to suits by aggrieved individuals in their own right and 42 U.S.C. 405(i) specifies that plaintiffs who prevail in the courts obtain judgments of entitlement, whereupon the Federal Security Administrator is to certify to the Managing Trustee (42 U.S.C. 401(b)) the name and address of the person entitled to payment, the amount, and the time. No other kind of action against the United States or the Federal Security Administrator is authorized, and establishment of a fund for any purpose would be violative of 42 U.S.C. 405(h) and 405(i) and of R.S. 3477, 31 U.S.C. 203. The right to payments under Title II is not transferable or assignable, at law or in equity, 42 U.S.C. 407. Consequently, no equitable lien for services may be awarded and no fund may be established or preserved, whether as a source of attorney's fees or otherwise.

14. In accordance with the provisions of Title II, Section 205(g) of the Social Security Act as amended (Title 42 U.S.C. Section 405(g)) defendant files herewith as part of his answer a certified copy of the transcript of the record, including the evidence upon which the findings and decisions complained of are based.

Wherefore, defendant prays for judgment dismissing the complaint with costs and disbursements,

and for judgment in accordance with Section 205(g) of the Social Security Act as amended, 42 U.S.C. 405(g), affirming the decision complained of; and for such other relief as may be appropriate.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed October 7, 1948.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Plaintiff, Mary R. Baiocchi, moves this honorable Court for a summary judgment in her favor as prayed for in her Complaint and against the defendant above named, upon the grounds that there is no genuine issue as to any material fact in this action and that plaintiff is entitled to the judgment prayed for in her Complaint as a matter of law.

Said motion will be based upon the Complaint, the Answer of the defendant, the transcript of the proceedings of the Social Security Administration on file herein, the records and files in said action, points and authorities filed herewith and upon Rule 56(a) and (c) of the Federal Rules of Procedure and Sections 205 and 209 of the Social Security Act as amended (Title 42, U.S.C.A. 405 and 409).

Dated: June 6, 1949.

/s/ ARTHUR L. JOHNSON,
Attorney for Plaintiff.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

To the Defendant, Oscar R. Ewing, Federal Security Administrator, and to Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, his attorneys:

You Will Please Take Notice that the undersigned will bring the above Motion for Summary Judgment on for hearing before the above entitled Court, in the court room thereof in the United States Post Office Building, 7th and Mission, San Francisco, California, on the 15th day of July, 1949, at the hour of 2:00 o'clock p.m. of said day, or as soon thereafter as counsel can be heard.

Dated: June 6, 1949.

/s/ ARTHUR L. JOHNSON,
Attorney for Plaintiff.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT
OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This action was brought by the plaintiff to secure a review by this Court of the findings, decisions and awards of the Social Security Administration acting through its Appeal's Council and Referee, made

upon the Application of the plaintiff to said Administration for herself, as a widow and on behalf of her minor children for survivor's insurance benefits under the provisions of the Social Security Act of August 14, 1935, and the amendments thereof of August 10th, 1939 (42 U.S.C.A. 401 to 409).

The complaint of Mary R. Baiocchi rests upon the employment of her deceased husband, Almando Baiocchi, in covered employment for the seventeen calendar quarters that are required by the provisions of 42 U.S.C.A. 409 (g) to make the deceased employee a "Fully Insured individual." This status or that of a "Currently insured individual" is required, among other factors, for the plaintiff, a widow, to recover benefits on her own behalf under 42 U.S.C.A. 402 (e) or benefits for the dependent minor children under 42 U.S.C.A. 402 (c).

Subsequent to the plaintiff's application, as a widow, on behalf of herself and children on July 18, 1945 (Tr. p. 67, Exhibit A), benefits were denied to her. On November 3, 1947, the plaintiff made a request for reconsideration (Tr. p. 72, Exhibit C). On 4 May 1948, your plaintiff requested a hearing (Tr. p. 9, Exhibit B) before the regional referee which hearing was held before Martin Tieburg, a referee of the Federal Security Agency, on May 26, 1948. An adverse decision was rendered by the referee, Martin Tieburg, on June 8, 1948, (See Tr. p. 5 through 9). Plaintiff, herein, requested a review of the Referee's Decision on June 10, 1948, (Tr. p. 3) which request was denied by the Appeals Council on June 29, 1948 (Tr. p. 2).

The decision of the referee is best summed up by the words of the decision itself (Tr. p. 5) wherein the referee states:

“The claimant contends that the services rendered by her husband for the California Prune and Apricot Growers Association were in covered employment and that all of his earnings from such employment should be credited by the Social Security Administration as wages as a result whereof the wage earner would have at the time of his death a fully insured status.”

“The benefits applied for by the claimant on behalf of her children are provided for in section 202(c) of the Social Security Act, as amended, and the benefits applied for by the claimant on her own behalf are provided for in section 200(e). The claimant, on her own behalf and on behalf of her children, has satisfied all of the conditions of entitlement under those sections, with the exception of those conditions which require that the wage earner have been, at the time of his death, a fully or currently insured individual.” (Emphasis added.)

The referee then adds, at p. 8 of the transcript and p. 4 of his decision, the following observation as to the type of work performed by the deceased employee for the California Prune and Apricot Growers Association:

“From the evidence in this record it appears that the Association performs its functions and handles its produce substantially identical to the manner and methods utilized by Rosenberg Brothers, a com-

mercial packer. Rosenberg Brothers was the employer involved in the case of *Miller vs. Burger*, 161 Fed. 2d. 992, in which case it was held that as processor of dried fruit was not engaged in agricultural labor.”

The position taken by the referee, after quoting the definition of “Agricultural labor” found in 42 U.S.C.A. 409(1), was as follows:

“The Social Security Administration has determined that the principles enunciated in the *Burger* case, (*supra*), do not establish a basis for a finding that an individual rendering processing services for a cooperative association is engaged in ‘employment’ within the contemplation of the Social Security Act, as amended. The position taken by the Administration is to the effect that services on and after January 1, 1940, in the handling, packing, packaging, processing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of dried fruit, as well as fresh fruit and fresh vegetables, where such handling is for the account of the producer (i.e., where the processor, whether a cooperative or a commercial handler, operates on a fee basis and does not buy the producer’s product outright), are excepted services under section 209 (1) (4) of the Social Security Act, as amended.”

“The referee, accordingly, finds that the services rendered by the wage earners since January, 1940, as a dried fruit processor, excluding services rendered as a maintenance man, for the California

Prune and Apricot Growers Association, a cooperative association, are excepted as "agricultural labor" under section 209 (1) (4) of the Social Security Act as amended."

The decision of the Administration, refusing to classify Baiocchi's earnings, after January 1st, 1940, as wages within the purview of the Act, is the real basis for the Plaintiff's prayer to this Court to reject the decision of the Administration as a matter of law. As is seen from the referee's decision quoted above, all other facts necessary for the plaintiff's recovery for herself, as a widow, or on behalf of her children, were found in favor of the plaintiff by the Administration, and thus no discussion of those facts is necessary herein. With the exception of the single error of deciding that Baiocchi's services constituted "agricultural labor," the decision of the Social Security Administration is in conformity with the Social Security Act.

Facts

The Social Security Administrator has filed with his answer a complete transcript of the proceedings upon plaintiff's application for insurance benefits, and transcript referees herein and above are to that record.

Almando Baiocchi was employed by the California Prune and Apricot Growers Association, which has filed its articles of incorporation in accordance with California law. The above mentioned corporation will hereafter be referred to as the "Central Sales Agency," as it is called in all of its contracts with

the local corporations. (See Tr. p. 89, Exhibit L.) The Central Sales Agency is then a non-profit corporation composed of some 28 local non-profit corporations, which will hereafter be referred to as "Locals," as they are called in all of their contracts with growers who become members therein. (See Tr. p. 88, Exhibit K.)

The Central Sales Agency employed Almando Baiocchi from the latter part of 1939 to November 4, 1944, (Tr. p. 6). Over that period, he performed services in four separate functions of the operations of the Central Sales Agency i.e., (1) Processing and packing; (2) Receiving and grading; (3) Shipping, and (4) Maintenance (Tr. p. 6).

The fruit handled by Baiocchi was received by the Central Sales Agency in the sulphured, dried state from the Locals to whom title had passed under the contracts between the Local and the members of the Corporation (See Tr. p. 88, Exhibit K). Upon receipt by the Central Sales Agency, title passed from the Local to the Central Sales Agency (See Tr. p. 89, Exhibit L, and p. 48-52). Only thereafter and while in the employment of Central Sales Agency, did Almando Baiocchi process, pack or grade any of the dried fruit.

Baiocchi did not own a ranch, farm, or orchard, or do any agricultural labor, but was a packing house worker throughout. (Tr. p. 8.)

The Central Sales Agency is a packing and processing corporation dealing only with dried fruits. It handles approximately one-third of the prunes

manufactured by farmers in the State of California. (Tr. p. 43.) Its members are 28 local, non-profit corporations and it has some sixteen plants for the receiving, grading, packaging and shipping of prunes in California. It is almost twice as large as any of its competitors in California. (Tr. p. 44.) It has a coverage from as far north as Red Bluff to as far south as Tehachapi Mountains. It has employed as high as 1,574 people at one time and the labor turn over is as high as 102%. (Tr. p. 43-44 and p. 87.) The Central Sales Agency employs graders, processors, packers, electricians, machinists, clerical personnel, salesmen, public relations men, and executives. It does not own any farm, orchard, or ranch nor does it raise, produce, or harvest any fruit. (Tr. p. 58 and 62.) The manufacturing plant in San Jose (pictured in Tr. p. 91, Exhibit M) is located in an area zoned "Heavy Industrial" and is adjacent to and served by transcontinental railroad. The physical operations of the Central Sales Agency corporation are identical with that of the Rosenberg Bros. Corporations (Tr. p. 35 and 36) and in the words of the referee in his decision:

"From the evidence in this record it appears that this Association performs its functions and handles its produce substantially identical to the manner and methods utilized by Rosenberg Brothers, a commercial packer. Rosenberg Brothers was the employer involved in the case of *Miller vs. Burger*, 161 Fed. 2d. 992, in which case it was held that a processor of dried fruit was not engaged in agricultural labor." (Tr. p. 8.)

Dried fruit is produced by the farmers who grow it. The farmer picks the fruit, sulphurs it, dries it or hires others to perform the above services and then delivers it in the dried form to the growers' market, which in this case is the Central Sales Agency. (Tr. p. 39 to p. 41 and p. 47.) The dried fruit is transported to the Local by the grower and there title passes to the Local if the goods are in a deliverable state and are accepted by them. (Tr. p. 88, Exhibit K.) The fruit may be and is comingled, after grading, with that of other members. The loss or destruction of the goods would fall upon the corporation that held title at the time of loss. (Tr. p. 88, 89, and 50.) The corporation, Local or Central Sales Agency, in whom title is vested, has an insurable interest and insures the product. The corporation, Local or Central, can pledge, borrow money, or issue warehouse receipts on the dried fruit and at times has. (Tr. p. 48 and 88, 89.)

When the Local turns the dried fruit over to the Central Sales Agency in a merchantable state, after the latter's acceptance, title passes from the Local to the Central. (Tr. p. 89.) Complete payment of the purchase price is postponed, but it is fixed and the Central is subject to the Locals to account according to the contract, bi-laws and statutes. The Central must render bookkeeping services for the Local. (Tr. p. 90.)

The fruit is graded, processed, and packed at the packing houses of the Central Sales Agency. (Tr. p. 36.) It is packed in packages or bulk. (Tr. p. 37.) It is processed and packed by the Central Sales

Agency (Tr. p. 36) upon order. The dried fruit sometimes remains in storage for as long as 18 months before it is packed. (Tr. p. 36.)

The fruit is sold by the Central Sales Agency under its own brands and also under private brands owned by its customers. (Tr. p. 89 and p. 37.) The dried fruit leaves the packing-plant in the same condition as it is when sold to the housewife. (Tr. p. 37 and 39.) About 40% of the prunes are sold in carton or package form and the remainder sold in bulk. (Tr. p. 37.) About 40% of the carton pack is sold to chain stores and about 75% of the bulk pack is sold to chain stores and super-markets. (Tr. p. 38.)

Farmers, in general, now do not sell dried fruit directly to wholesalers or consumers, although this was formerly the trade practice in cracker-barrel days. (Tr. p. 47.) All fruit is now processed and packed before marketing. (Tr. p. 47.) Farmers do not usually perform any of the functions of grading, processing and packing. (Tr. p. 47.)

The California Prune and Apricot Growers Association has desired and does desire that its employees be included within the coverage of the Social Security Act. (Tr. p. 53 and p. 61.) The Central Sales Agency believes it was the intent of Congress to include their employees and during all of the period in question they have continued to make the deduction from wages and have paid taxes pursuant to the provisions of the Social Security Act. (Tr. p. 61 to 63.)

The above facts are established without conflict, and so clearly and distinctly as to prohibit question or contradiction. Neither the Central Sales Agency nor the Local corporations own or operate a farm, or prepare for market any agricultural commodity as an incident to the operation of any farm or agricultural function. The dried fruit purchased by the Central Sales Agency from the local corporations is produced, harvested, sulphured, and dried by the grower on his own ranch as a part of his occupation. It is then sold by the grower to the Local and resold to the Central Sales Agency. Title from the Central Sales Agency to the farmer is twice removed. The farmer's connection with the product has ceased. He has parted with his economic interest in that crop and has only an interest in the sales price.

None of the processes used by the Central Sales Agency are carried on by farmers. They are a part of a highly skilled and complex business enterprise at the terminal market for distribution for consumption. The fruit is sent directly from the packing house to the purchaser. No other market exists between the packing plant and sales office of the Central Sales Agency and the normal channels to consumption.

Upon this clear and uncontradicted evidence, the Referee on June 8, 1948, found that the services rendered by Almando Baiocchi since January 1, 1940, as a dried fruit processor were excepted, as "agricultural labor," under section 209 (1) (4) of the Social Security Act, as amended, and hence the

said deceased employee was not a "fully insured individual." Therefore, the widow's claim on behalf of herself and minor children for benefits was denied. On June 29, 1948, The Appeals' Council denied a request for review of the above decision.

Plaintiff contends that this decision is error and should be reversed as a matter of law.

The Statute Involved

Section 202(e) of the Social Security Act provides:

"(e) (1) Every widow (as defined in section 209(j)) of an individual who died a fully or currently insured individual after December 31, 1939, if such widow (A) has not remarried, (B) is not entitled to receive a widow's insurance benefit, or is entitled to receive primary benefits each of which is less than three-fourths of a primary insurance benefit of her husband, (C) was living with such individual at the time of his death, (D) has filed application for widow's current insurance benefits, and (E) at the time of filing has in her care a child of such deceased individual entitled to receive a child's insurance benefit, shall be entitled to receive a widow's current insurance benefit for each month, beginning with the month in which she becomes so entitled to such current insurance benefits and ending with the month immediately preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to receive a child's insurance benefit, she becomes entitled to receive a primary insurance benefit of her deceased

husband, she becomes entitled to receive a widow's insurance benefit, she remarries, she dies.

(2) Such widow's current insurance benefit for each month shall be equal to three-fourths of a primary insurance benefit of her deceased husband, except that, if she is entitled to receive a primary insurance benefit for any month, such widow's current insurance benefit for such month shall be reduced by an amount equal to a primary insurance benefit of such widow."

42 U.S.C.A. 409(e)

Section 202(c) of the Social Security Act provides in part:

"(c) (1) Every child (as defined in section 209(k) of an individual entitled to primary insurance benefits, or of an individual who died a fully or currently insured individual (as defined in section 209(g) and (h) after December 31, 1939, if such child (A) has filed application for child's insurance benefits, (B) at the time such application was filed was unmarried and had not attained the age of 18, and (C) was dependant upon such individual at the time such application was filed, or, if such individual has died, was dependant upon such individual at the time of such individual's death, shall be entitled to receive a child's insurance benefit for each month, beginning with the month in which such child becomes so entitled to such insurance benefits, and ending with the month immediately preceding the first month in which any of the following occurs:

such child dies, marries, is adopted, or attains the age of eighteen . . .”

42 U.S.C.A. 409(c)

The term “employment,” as related to the issues in this case, is defined in Section 209(b) as follows:

“The term ‘employment’ means any service . . . of whatever nature, performed after December 31, 1939, by an employee for the person employing him . . . except . . .”

“(1) Agricultural labor (as defined in subsection (1) of this section).”

“(10) (A) Service performed in any calendar quarter in the employ of any organization except from income tax under section 101 of the Internal Revenue Code, if—

(i) the remuneration for such service does not exceed \$45.00 or

(B) Service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101(1) of the Internal Revenue Code.”

42 U.S.C.A. 409(b)

Agricultural labor is defined, in subsection (1) of section 209 as follows:

“The term ‘agricultural labor’ includes all services performed . . .

“(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity including the raising,

shearing, feeding, caring for, training and management of livestock, bees, poultry and fur bearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging lumber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple syrup or maple sugar or any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial

canning or commercial freezing or in connection with any agricultural or horticultural-commodity after its delivery to a terminal market for distribution for consumption."

"As used in the subsection, the term 'farm' includes stock, dairy, poultry, fruit, fur bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards." (Emphasis added.)

The Question to be Decided

I. Did the services performed by Baiocchi in the years, 1940 through November, 1944, for a non-profit corporation in its packing house in San Jose consisting of processing and packing, and receiving and grading dried fruit for the purpose of preparing such dried fruit for sale by the packer to chain stores, cooperatives and super markets constitute agricultural labor within the definition of the Social Security Act, when:

(1) Baiocchi did not own, operate, or work on a farm in connection with cultivating the soil or in connection with raising or harvesting any agricultural or horticultural commodity.

(2) Baiocchi was not the employee of any owner or tenant or other operator of a farm, in connection with the operator, management, conservation improvement or maintenance of such farm and its tools and equipment.

(3) Baiocchi did not perform any service as an

incident to ordinary farming operations nor as an incident to the preparation of fruits or vegetables for market.

(4) Baiocchi did perform services after delivery to a terminal market for distribution for consumption and after the dried fruit had reached the farmers' or "growers' " market.

II. Would a statute which includes employees of profit corporations in the packing of dried fruits as covered employment and which excludes employees of non-profit corporations in the packing of dried fruits as "agricultural labor" not be unconstitutional as violative of "due process of law" as guaranteed by the 5th Amendment of the United States Constitution, when:

(1) Both corporations render identical services and operate in the same manner.

(2) Both corporations have large clerical and accounting staffs.

(3) The employees of each corporation do identical work.

Argument

I.

The Act Must Be Construed Liberally and All Exceptions to Its Operation Must Be Construed Strictly

That the act should be construed liberally and all exceptions to its operation must be construed strictly

is settled law and requires no exhaustive citation of authority.

When the act was declared constitutional by the Supreme Court of the United States, it was on the basis that Congress was empowered to promote the general welfare; that unemployment was a national evil and that; in the interest of the general welfare, Congress could appropriate funds to remedy the evil.

Helvering v. Davis, 301 U.S. 619, 57 S. Ct. 904.

Steward Machine Company v. Davis, 301 U.S. 548, 57 S. Ct. 904.

The broad purpose of the legislation to remedy the evils of national unemployment shows the way at once to a liberal and broad interpretation of its coverage, purposes and intents.

The Act contained initially certain exceptions founded upon definite reasons of administrative convenience, or of sovereign supremacy, or of public interest. The fact that the classification was not arbitrary resulted in the sustaining of the exceptions against constitutional challenge. One can not help but be impressed with the broad interpretation of the Act given in the above cited leading cases by the learned Justice Cardoza.

This broad interpretation exists today and many excellent opinions of other Judges and Justices express it.

For example, in *Grace v. Magruder*, 148 Fed. (2d) 679 at 680;

"The . . . persons involved in this case . . . are obviously subject economically to the evils the laws were designed to combat,⁸ and the remedies those laws afford are appropriate for preventing or curing the evils."⁹

The Judge then quotes from Judge Parker of the Fourth Circuit Court of Appeals, at p. 681;

"The Social Security Act . . . was enacted pursuant to a public policy unknown to the common law; and its applicability is to be judged . . . from the purposes Congress had in mind . . ."

Again speaking through Judge Major of the Seventh Circuit Court of Appeals, in *Carroll v. Social Security Board*, 128 Fed. 2d. 876 at 881, the same thought finds expression when the court says:

"The purpose which Congress had in mind, and the object sought to be accomplished by the enactment before us is aptly stated in *Helvering v. Davis*. . . . That it should be liberally construed in favor of those seeking its benefits cannot be doubted."

Because of the above well established rule of construction, the rule which is its complement is as clearly settled; namely, the exception to the general scope of the Act is subject to strict construction and should not be extended to unduly restrict the coverage and effectiveness of the legislation.

In *Fleming v. Hawk-eye Pearl Button Co.*, 113 Fed. 2d 52, Judge Gardiner of the Eighth Circuit after stating the above rule of construction quoted from the opinion in *U. S. v. Dickson*, 15 Pet. 141 at 165:

"In the last cited case it is said: 'In short a

proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof.' "

Judge McCormick in *Latimer v. United States*, 52 Fed. Supp. 228 at 234, phrased the rule of construction forceably as follows:

"Therefore, a realistic approach to the social and economic security of employees in present-day large scale enterprises of all kinds requires that all doubt in construing remedial statutes providing unemployment insurance and old age protection and containing tax expositions should favor coverage rather than exemption."

The above remarks are repeated with approval in the recent and leading case of *Miller v. Burger*, No. 11480, C.C.A. 9th, June 5, 1947, 161 Fed. (2nd) 992.

Judge Shaw in *Cal. E. Com. v. Black Fox Inst.*, 43 Cal. App. 2nd Supp. 868 at 872, comments:

"It sets up a scheme for ameliorating the hardships of unemployment. . . . In view of the purpose of these provisions, they should not be whittled down by narrow construction, nor should exceptions not clearly justified by their language be engrafted upon them by judicial interpretation."

The last word in this respect is to be found in the learned opinion of District Judge Mathes in *Burger v. Social Security Board*, 66 F. Supp. 619 at 626, wherein it is said:

"It is settled that the Social Security Act should be liberally construed in favor of those seeking its

benefits. All doubts of interpretation are to be resolved in favor of coverage.”

It is therefore suggested that the rules of construction are established that the Social Security Act should in common with other remedial legislation be liberally construed and that exceptions to its operation must be strictly construed.

II.

The Court, In Construing the Act, Is Not Bound By the Decision of the Social Security Administration

There is no conflict of fact in the case at bar. The facts are clear and obvious and are as reported by the referee. There is no controversy of mixed law and fact. The whole case rests upon a question of law; namely, whether the deceased employee, Almando Baiocchi, performed “agricultural labor” within the meaning of the Act as quoted heretofore. This, it is submitted, is a pure question of law which must be determined by this honorable Court.

In *Carroll v. Social Security Board*, (*Supra*) the Seventh Circuit when faced with a similar problem commented:

“Moreover in our view, the rule (that the court is bound by the findings of the Board) has no application, because the question presents an issue of law rather than fact. It involves a construction of the act.”

In such a manner, Circuit Judge Bone of the Ninth Circuit, also, in an identical case to the case at bar commented in the case of *Burger v. Miller*,

No. 11480, June 5, 1947, 161 ed. (2nd) 992 at p. 995:

“While the findings of fact of the Social Security Board are supported by the evidence, we think its decision was incorrect when measured off against the language of the Act and the intent of Congress in adopting the 1939 amendment thereto. The District Court was justified in reversing the decision of the Board . . .”

In the sister case of *Miller v. Bettencourt*, No. 11501, C.C.A. 9th, June 5th, 1947, 161 Fed. 2nd 995, the same Judge commented at p. 996:

“This being true, as a matter of law, the labor of appellee in the Rosenberg plant was not ‘agricultural labor’ . . .”

The leading case in this regard is *Social Security Board v. Nierotko*, February 25, 1946, 327 U.S. 358, 66 S. Ct. 637, 643, wherein it is said:

“An agency may not finally decide the limits of its statutory power. That is a judicial function. . . . The Board’s interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation.”

Thus the Court here may construe and apply the statute in accordance with its language and in view of the broad purpose of the statute, unrestricted by any interpretation of the Social Security Administration.

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III.

The Services Rendered by Baiocchi Were Not
Agricultural Labor

It is difficult to see how the Social Security Administration can avoid ruling that the employment of Almando Baiocchi and the other employees of the Central Sales Agency is in covered employment.

In fact, the administration, at first, ruled that it was "abundantly clear" from the Burger and Bettencourt decisions (*supra*) of the Circuit Courts of the Ninth Circuit, that work of the type done by Baiocchi for the same cooperative employer was in covered employment. (Tr. p. 103, Exhibit R, and Tr. p. 106, Exhibit S.) The administration then, without any reason being given, reversed its decision.

The Referee in his decision of June 8, 1948, commented as follows:

"The Social Security Administration has determined that the principles enunciated in the Burger case, (*supra*), do not establish a basis for a finding that an individual rendering processing services for a cooperative association is engaged in 'employment' within the contemplation of the Social Security Act, as amended. The position taken by the Administration is to the effect that services on or after January 1, 1940, in the handling, packing, packaging, processing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of dried fruit, as well as fresh fruit and fresh vegetables, where

such handling is for the account of the producer (i.e., where the processor, whether a cooperative or a commercial handler, operates on a fee basis and does not buy the producers product outright), are excepted services under section 209 (1) (4) of the Social Security Act, as amended * * * ”

These words should be compared with the referee's finding of fact (Tr. p. 8), wherein the referee states:

“From the evidence in this record it appears that the association performs its functions and handles its produce substantially identical to the manner and methods utilized by Rosenberg Brothers, a commercial packer. Rosenberg Brothers was the employer involved in the case of *Miller vs. Burger*, 161 Fed. 2d. 992, in which case it was held that a processor of dried fruit was not engaged in agricultural labor.”

When the two quotations are contrasted, the position of the Social Security Administration is either one of two alternatives. Either the Administrator is ignoring the *Burger* and *Bettencourt* cases and thus forcing the employees of two large dried fruit cooperatives, (the California Prune and Apricot Growers Association and Sunmaid Raisin Growers Association) to take recourse to the federal courts individually at enormous expense to each plaintiff, counsel, court and government to protect their social security benefits, or, as a second alternative, the Social Security Administration has misapplied the law even as they state it.

Considering the first alternative initially. It takes

no exhaustive brief to point out when the facts of this case are identical to the Burger case, (*supra*), and when the law is constant (the statute and its interpretation remaining the same), the results must be the same. The dried fruit in the Burger case had reached both the "growers' market" and the "terminal market." The referee found the facts to be identical in the case at bar. The dried fruit here also has reached the "growers' market" or the "terminal market." Employment rendered after the fruit had reached the "growers' " market is covered employment and, even though it hasn't reached the "growers' market," if the fruit has reached the "terminal market," services rendered thereafter are in covered employment.

As is intimated in the referee's decision, the administration regards processing services for a co-operative as not covered employment. The word "cooperatives" is not once used in Title II of the Social Security Act (except by indirect reference to the I.R.C.). It is not even mentioned in 42 U.S.C.A. 409 (1), the section which defines "agricultural labor." Is the Administration attempting to legislate a new exception to coverage under the Social Security Act? Neither Congress nor the Courts have ever attempted to distinguish between work rendered for corporations (profit or non-profit) in defining agricultural labor. The test of "agricultural labor" has always been to the legislature, judiciary, and citizenry a question of the type of work done. (See Tr. p. 100). Moreover,

the statute in question plainly determines the services rendered to be covered employment and not agricultural labor. (A more detailed discussion of the statute will follow later.)

A second explanation of the position taken by the Social Security Administration may be that they have misapplied even their own concept of the law. This is more logical for it is fantastic that the Administration would contemplate administrative legislation as gross as the insertion of a "co-operative" distinction into 42 U.S.C.A. 409 (1). The fact that this misunderstanding might be the case is shown by the referee's explanation (Tr. p. 8) that where the handling is for the account of the producer (i.e. where the processor operates on a fee basis and does not buy the producer's product outright), the administration regards the employment to be "agricultural labor."

Erroneous as this may be, it is according to the referee's own words not the case at bar.

In the case at bar, title passed from the grower after he has manufactured the dried fruit and delivered it to the Local, a non-profit corporation. Title then passed from the Local to the Central Sales Agency, another non-profit corporation, before the deceased employee ever packed or processed the fruit for national and international distribution. No fee is charged by the Central Sales Agency and the producer's product is bought outright. The fruit is co-mingled and if a loss without fault occurs, the loss falls upon the corpora-

tion and not the individual Local supplying it or the individual grower supplying it to which ever one of the 28 local corporations that forwarded it. No agency relationship exists in such a situation.

Applying those admittedly true facts to the statement of law by the referee, it is at once apparent that the facts of the case at bar as found by the referee differ from the statement of the law made by the referee and that the services rendered were not agricultural labor.

Thus, in either case, the decision must be reversed as a matter of law, either because the facts are identical with the Burger case (except that the corporation in the case at bar is a non-profit corporation) and no grounds for a statutory distinction between profit and non-profit corporations exist or because applying the Administration's concept of the law the facts of the case as found by the referee require a recovery as a matter of law since the Central Sales Agency was not charging a fee and because the producer's product was bought outright.

Although either of the above alternatives requires a recovery for the complainant herein, counsel for plaintiff can not help but urge this court to place its decision upon the broadest grounds possible; namely, that after the grower manufactures the dried fruit and delivers it to his "market," whether his market be a cooperative, non-profit corporation or when he delivers it to a "terminal market," whether the terminal market be a profit partner-

ship, non-profit corporation, profit corporation, co-operative, or whatever form of business association is used, that the processing, packaging and shipping workers, employees of that business association, are employees entitled to Social Security benefits if they otherwise qualify under the Act.

This request is made for a series of reasons. First, it is a correct statement of the law. Second, Social Security benefits are a vital matter to American citizens and they are bewildered when they discover for a technical reason that they cannot comprehend why they, after contributing to the fund for twelve years, not only cannot draw the benefits but also must withstand the expense of suing in this Court to receive what is rightfully theirs as a matter of law. Third and lastly, counsel for plaintiff herein has devoted four years of his life testifying before congressional committees, appearing as counsel and *amicus curiae* in the Burger and Bettencourt cases (*supra*) and representing plaintiff and others herein, on this one small point of law so vitally affecting thousands of workers, widows and children throughout this district. Even now new proceedings are being instituted on behalf of the employees of the Sun Maid Raisin Growers Association and that case, since differing slightly on the facts, unless the case at bar is decided upon the broad and true basis will require counsel again to appear in the District Court on the precise facts of that case.

The time of counsel, the United States Attorney, and of this court should not be wasted. A broad

decision reiterating the Burger rule, as is outlined above, will clarify the entire matter for all of the dried fruit employees of these two corporations without further expensive and time-consuming litigation upon this one minute segment of the law.

It is the plaintiff's contention that the Burger and Bettencourt cases establish that the employees of a terminal market or of a growers' market are not in agricultural labor, but one performing services within covered "employment" under the Social Security Act, as amended, regardless of the business structure of the organization that is the "market" or "terminal market." This used to be the Administration's attitude. (See Tr. p. 100).

This is the square holding in the Burger case, in 66 Fed. Supp. 619 at p. 624, wherein Judge Mathes held:

"Services performed in treating and handling an agricultural commodity after delivery to a terminal market for distribution for consumption unquestionably do not constitute an integral part of farming activities. And it is clear from the last sentence of paragraph (4) of the legislative definition that Congress did not intend to exempt such services as agricultural labor, even when performed for the account of the producer or grower."

"This legislative intent is unambiguously expressed.

"Delivery to a terminal market for distribution for consumption" is fixed by statute as a definitive

boundary. Thus Congress has drawn a line of demarcation across the various pathways followed by agricultural and horticultural commodities in passing from producer to consumer, and has declared that once the commodity reaches the market, from which in ordinary course of trade it next goes into the channels of distribution, any service afterwards performed for any person in treating or handling such commodity does not constitute 'agricultural labor' within the meaning of the act."

The Burger case was affirmed on appeal by the Ninth Circuit on June 5, 1947, in 161 F 2d. 992 and is the law of this circuit. The referee's decision (Tr. p. 8) is squarely contra and must be reversed as a matter of law.

The Burger case also establishes the rule without question that by the term "market," Congress means the grower's market. Up until the "grower's market" is reached, services performed by anyone or any type of business association for the account of the grower or producer was exempt as being "agricultural labor." But as is stated in the Burger case, 66 F. Supp. 619 at p. 626:

"Beyond that point—beyond the normal market of the producer or grower—the commodity must bear the burden of the taxes regardless of who owns it."

There could be no clearer exposition of the law. The decision of the referee (Tr. p. 8) is completely opposed to the statute and must be reversed as a matter of law.

The companion case of *Bettencourt v. Social Security Board*, 66 Fed. Supp. 629, was similarly treated except that Judge Goodman did not feel it essential to determine that the word "market" as used in 42 U.S.C.A. 409 (1) meant "grower's market."

Both the *Burger* and *Bettencourt* cases were appealed by the Social Security Administration and were affirmed in 161 F. 2d. 992 and 161 F. 2nd 995, respectively. In the *Burger* case, Judge Bone speaking for the court held that the *Rosenburg Bros.* plant was a "terminal market" and a "market" (held to properly mean a "grower's market") and the decision of Judge Mathes was affirmed. The *Bettencourt* case was, likewise, affirmed.

One of the findings of fact by the referee in the case at bar was that the Central Sales Agency operated in an identical manner to the *Rosenburg Bros.* plant. The conclusion is thus inescapable that the administration's decision is wrong as a matter of law and must be reversed.

The fact that *Baiocchi* worked for a non-profit corporation and *Burger* worked for a profit corporation is unimportant as is seen in many cases, one of the clearest of which is the recent decision of *California Employment Commission vs. Butte County etc. Assn.*, 25 Cal. 2nd. 624, 154 P. 2d. 892. Speaking of a corporation organized under the same law as the Central Sales Agency and Locals involved therein, the Court therein at p. 636 and 637 said:

“The nature of the defendant’s corporate structure is immaterial for ‘cooperative corporations are just as distinct an entity as are other private corporations.’ (Fletchers Cyclopedia of Corporations (perm. ed.) Vol. I #25, p. 90.) The doctrine of separate entity will be disregarded only to prevent fraud or grave injustice * * * Obviously no such reason exists here for ignoring the plain language of the effective administrative definition—but, on the contrary, to treat the defendant corporation nevertheless as the alter ego of the individual former members would, in fact, promote injustice by unnecessarily restricting the operative scope of the unemployment insurance law of this state, a limitation wholly out of line with the beneficent purpose of such legislation that, consistent with its terms, the coverage provisions have a broad application.”

(Emphasis by Court.)

See also in this respect *Cowiche Growers, Inc. vs. Bates* (1941), 10 Wn. 2d. 585, 117 P. 2d. 624; *Employment Security Commission vs. Arizona Citrus Growers* (1944), 61 Ariz. 96, 144 P. 2d. 682; *H. Duys and Co. v. Tone*, 125 Conn. 500, 5A. 2d. 23; *Maryland and Virginia Milk Producers Assn. Inc. v. District of Columbia*, 73 App. D. C. 399, 119 F. 2d. 787.

The same ruling was made in *North Whittier Heights C. Ass’n. v. National Labor Relations Board*, 9 Cir., 109 F. 2d. 76. While this latter case

arose in connection with the National Labor Relations Act, 29 U.S.C.A. 151, it was quoted by Judge Bone in the Burger case (161 F. 2d. 992 at 994) as being in point in the "employees of dried fruit packing house" social security type cases. The court in the North Whittier case said:

"Petitioner argues that if each member of the non-profit cooperative corporation that runs the packing house were to personally hire and direct those doing his own packing and sorting, the work would be agricultural and his employees would be agricultural laborers; that it follows, therefore, that in the case of the same members acting under a single organization to accomplish the same results, there can be no change in the nature of the work nor in the status of the persons doing it. The conclusion does not follow. The factual change in the manner of accomplishing the same work is exactly what does change the status of those doing it. The premise laid down by the petitioner in this phase of its argument is not, however, the exact situations facing us. The packing house activity is much more than the mere treatment of the product. When it reaches the packing house it is then in the practical control of a great selling organization which accounts to the individual farmer under the terms of the statute law and its own by-laws."

The remarks in the Burger case (66 Fed. Supp. 619 at 626) are directly in point.

Actually, the fact that Baiocchi worked for a

non-profit corporation makes the case even stronger than if he had worked for a profit corporation.

Look to the plain words of the statute. Employment is defined in section 209 (b) broadly as all services, of whatever nature. There are definite exceptions, however. Exception 9 (B) of section 209(b) excepts service performed in employ of an agricultural organization exempt under 101 (1) of the I.R.C. That that is not this case is shown by T.D. Reg. 111-Sec. 29 101(1)-1 which explains that exception as applying to organizations which “(1) Have no net income inuring to the benefit of any member; (2) Are educational or instructive in character; and * * *”

That is obviously not the Central Sales Agency. It does have “net income inuring to the benefit of” all of its members and isn’t educational or instructive in character. (Tr. p. 62).

The Central Sales Agency, however, is excepted by sub-section 10(A) of Section 209(b) of the Social Security Act as to services not exceeding \$45.00 per quarter. It is exempt from corporate income taxation and has been granted an exemption under the provisions of Internal Revenue Code 101 (12) (See Tr. p. 62). The statute, Section 209(b) 10(A), (Social Security Act) is plain that employment, as defined therein, includes services rendered a corporation exempt under any sub-section of I.R.C. 101 (except I.R.C. 101 (1)) if the remuneration exceeds \$45.00 per quarter.

The wording of the amendment to the Social Se-

curity Act in 1939 is plain. "Farmers, fruit growers, or other like associations organized and operated (a) for the purpose of marketing the products of their members or other producers." (I.R.C. 101 (12)) employing workers who earn wages in excess of \$45.00 are thus employing employees earning wages in covered employment, within the definition of the Social Security Act. The plain words of this 1939 amendment to 209 (b) show conclusively without doubt that the meaning of the 1939 amendment to 209 (b) was as interpreted in the Burger and Bettencourt cases and that the widow of Almando Baiocchi and his minor children are entitled to their benefits under the Social Security Act as a matter of law. The position of the Social Security Administration is absolutely without support and not only is wrong as a matter of law, but also has been manifestly unjust to her, and the other employees of the Central Sales Agency, in that she, Mrs. Baiocchi, a widow, has been compelled to wait over a period of three and one-half years for her benefits and for the benefits of her children, obtain the services of counsel to sue in this Court for benefits that are hers unquestionably, as a matter of law; in that, other employees have been compelled to return to the Treasury benefits that they have received and thus thousands of employees' rights are dependent upon the decision of this Court in this test case.

It would seem unnecessary to cite additional authority. Everyone in the west knows that the em-

ployee of the dried fruit packer, whatever the type of business association, is an industrial employee. The Burger and Bettencourt cases stand as the law upon the subject. They are wise decisions and are rendered according to the plain words of the statute and the court's knowledge of the common affairs of industry and business.

The decision of the referee is a surprising ruling since in square conflict with the above decisions. To your plaintiff, the widow of the deceased worker, it was even more surprising than to one trained in the intricacies of law. The usually dry words of the record change into life and significance at page 15 of the transcript when the referee asked the widow if there was anything pertinent to the matter that she should further testify to, and she remarked:

"Well, the thing is that I don't see why they should call that agricultural when that is in the city limits, almost in the middle of the city limits."

These words could perhaps have been better chosen or the phrases more artistically formed, but this widow, plaintiff herein, was trying to ask a government official why she, a widow, after her husband and his employer had contributed to social security from the date of its inauguration until this date, should be denied her widow's benefit and be put to the expense and delay of a trial and law suit. It is, indeed, a difficult question to answer even if it were an original question.

The referee's comment was, therefore, a matter of some delay but the answer was:

“Well, that is something, of course, that is quite technical, * * *”

Counsel for plaintiff is in full accord. To deny the plaintiff her benefits even as an original question would require quite a technical ruling. In light of the Burger and Bettencourt cases, such a technical, nebulous ruling is error as a matter of law and is impossible.

It is, therefore, urged that the decision should be reversed as a matter of law since no service was rendered (1) on a farm, (2) in the employ of the owner or tenant or other operator of a farm. The services rendered here, as in the Burger and Bettencourt cases, were rendered after the dried fruit had reached the grower's market and after delivery of the fruit to a terminal market for distribution for consumption.

IV.

An Interpretation Excluding the Dried Fruit Employees of Cooperatives and Including the Employees of a Commercial Packer Would Make That Section of the Act Unconstitutional.

The chief reason for excepting agricultural labor from social security coverage and other allied remedial legislation has been administrative and accounting problems. No such problems exist in the dried fruit packing house, whether commercial or cooperative. The Central Sales Agency, in question, has a large accounting force and under its contracts renders accounting services for its member corporations. It employs as high as 1500 work-

ers. It is a modern, efficient sales organization competing against other corporations on the open market in a highly competitive business. Moreover, there is no difficulty of collection. As a matter of fact, the money both taxes and contributions have been for twelve years and are now being paid to the Treasury Department.

In this respect, the California Supreme Court in *Cal. Emp. Com. v. Butte County etc. Assn.* (supra) quoting almost verbatim from *Latimer v. U. S.* (supra) at p. 231, commented:

“Second, the principal reason for exempting ‘agricultural labor’ from social and industrial benefits resulting from remedial legislation has been administrative difficulties and accounting inconveniences in farm work (*Carmichael v. Southern Coal and C. Co.*, 301 U.S. 495, (57 S. Ct. 868, 81 L. Ed. 1245, 109 A.L.R. 1327)), but with relation to employment in and operation and management of packing houses by respective associations, no such practical impediment exists. On the contrary, the usual economy, efficiency and skill with which such association units, functioning as adjuncts to agricultural pursuits, are operated by boards of directors and expert business managers, complemented by systematic office service, place them on no different level than other business enterprises insofar as concerns ability to comply with administrative computation procedure under unemployment compensation insurance laws.”

The corporation, the court was there discussing

was incorporated under the identical statute as are the corporations, Central and Local, in the case at bar.

As was pointed out in the Burger case (*supra*) at p. 627 by Judge Mathes:

“Likewise, here as the record clearly reveals the very factors which have been relied upon as constitutional justification for the ‘agricultural labor’ exemptions are entirely wanting. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 * * *”

A fortiorari, that is the case here where the packer is a corporation fully as large as Rosenberg Bros. corporation.

A physical distinction between the two corporations is impossible. They both perform identical services, employ the same type of labor to do the same type of work, and have large accounting and clerical staffs.

To deny Social Security Benefits to the employees of one and to grant them to the employees of the other would be arbitrary, capricious, legislation and classification in derogation of due process of law guaranteed to all persons by the 5th Amendment.

In this respect counsel wishes to point to the following authorities:

Lieper vs. Texas, 139 U.S. 462, Sup. Ct. 277.

Giozza v. Tierman, 148 U.S. 657, 12 Sup. Ct. 721.

U. S. v. Yount, D. C. Pa., 267 Fed. 861.

Steward Machine Co. v. Davis, 301 U.S. 1, 13, 83L. Ed. 441.

U. S. v. Armstrong, D.D., 265 Fed. 683.

U. S. v. New York, Etc. Co. 165 Fed. 742.

Sims v. Rives, 66 App. .C. 24, 84 Fed. 871, cert.
denied 298 U.S. 682, 56 S. Ct. 960, 80 L. Ed. 1402.

Lappin v. D. of Col., 22 App. D.C. 68.

V.

That the Interpretation Should Be Such as to Sustain the Act as Constitutional

As is stated in 11 Am. Jur. 96 at p. 725:

“It is an elementary principle that when the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction that would uphold it.¹⁰”

Cited as the leading cases in this respect are the following cases:

Chippewa Indians v. United States, 301 U.S.

358, 81 L. Ed. 1156, 57 S. Ct. 826;

Anniston Mfg. Co. v. Davis, 301 U.S. 337, 81

L. Ed. 1143, 57 S. Ct. 816;

Crowell v. Benson, 285 U.S. 22, 76 L. Ed.

596, 52 S. Ct. 285;

United States v. La Franca, 282 U.S. 568, 75

L. Ed. 551, 51 S. Ct. 278;

Reinicke v. Northern Trust Co., 278 U.S. 339,

73 L. Ed. 410, 49 S. Ct. 123;

Hooper v. Calif., 155 U.S. 648, 39 L. Ed.

297, 15 S. Ct. 207;

United States v. Howell, 11 Wall 432, 20

L. Ed. 195;

Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732.

It is, therefore, urged that the court construe the statute, herein, broadly and liberally, as the plaintiff has argued.

Such a construction results in the statute being held constitutional and removes any of the "grave doubts on that score." The construction urged will bring justice, equality, and satisfaction to all of the employers and employees and harmonize the scheme of social security worked out so elaborately in this country in the last decade.

Conclusion

In conclusion, plaintiff wishes to point out that the decision of the referee and of the Administration is error as a matter of law. The employer here has identical physical operations to that of Rosenberg Brothers. Burger performed services after the dried fruit had reached the terminal market for distribution for consumption and the grower's market. So did Baiocchi. The plaintiff, therefore, as the widow of Baiocchi, and her minor children are, on the undisputed facts of the case, entitled to the benefits as a matter of law.

That the Burger and Bettencourt decisions are a correct interpretation of section 209 (1) is without question. That they are correct as applied to an employee of a farmers', fruit growers', or like association, who earns over \$45.00 per quarter is made conclusive by reference to the plain words of the Act in section 209 (b) (10) (A).

It is further urged that due process of law is being denied the plaintiff herein by force of the Act

if she is excluded from receiving benefits therefrom because her husband was employed by the Central Sales Agency as opposed to Rosenberg Bros., when her husband and his employer contributed to the fund, when Rosenberg Bros. operates in an identical manner as the Central Sales Agency, renders identical services, employs the same type of labor to do the same type of work; when both corporations have large clerical and accounting staffs, and are active competitors.

Such a decision can be avoided by accepting the plaintiff's construction set out herein and should be accepted according to the cardinal rules of constitutional construction, to sustain the act's constitutionality.

Plaintiff, therefore, asks that this honorable court grant her motion for a summary judgment, deny defendant's motion for a summary judgment, and reverse the decision of the Social Security Administration.

/s/ ARTHUR L. JOHNSON,
Attorney for Plaintiff.

Receipt of copy attached.

[Endorsed]: Filed June 6, 1949.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEY'S FEES

Joseph E. McElvain, being duly sworn deposes and says that he has been chairman of the Appeals

Council of the Social Security Administration, Federal Security Agency, since February, 1940; that as such chairman, he has knowledge of all actions brought since that date under section 205(g) of the Social Security Act [42 U.S.C. 405(g)], to review decisions of the Appeals Council; that in no action brought under that section has any motion ever been made similar to the motion referred to in the letter of August 2, 1949, addressed by Arthur L. Johnson, Attorney for the plaintiff in the above-entitled action, to the Honorable George B. Harris, Judge of the United States District Court, Post Office Building, San Francisco, California, which letter is now a part of the files of this court. Said letter, together with copies of two letters addressed to Arthur L. Johnson, referred to on page 3 thereof and attached thereto, one from Arthur J. Altmeyer, Chairman, dated February 16, 1945, and one from Robert F. Wagner dated March 20, 1945, is made a part of this affidavit by specific reference thereto.

/s/ JOSEPH E. McELVAIN,
Chairman.

Subscribed and sworn to before me this 18th day of August, 1949.

[Seal] /s/ SARAH H. NAPIER,
Notary Public.

My commission expires Nov. 15, 1951.

Appendix

In the District Court of the United States for the
Eastern District of Washington, Northern Division

No. 425 and 441, Consolidated

COLFAX GRAIN GROWERS, INC., and
OAKESDALE GRAIN GROWERS, INC.,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came regularly on for trial on the 10th day of May, 1945, before the above-entitled Court sitting without a jury, Donald L. Burcham appearing as attorney for plaintiffs and Harvey Erickson and Thomas R. Winter appearing as attorneys for the defendant, and the court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the court for decision, and the Court being fully advised in the premises, now makes its Findings of Fact as follows:

1. That plaintiffs are farmers cooperative associations organized under the "Cooperative Marketing Act" of the State of Washington operating warehouses, elevators and pea processing plants for the purpose of handling, processing, grading, stor-

ing or delivering to storage or to market or to a carrier for transportation to market of agricultural commodities, and that it employs employees in performing said services.

2. That the members and patrons of said associations are farmers and owners of farms and said services are performed on products produced by the members and patrons in the ordinary course of farming operations and as an incident to farming operations.

3. That said services are of the character ordinarily performed by the employees of farmers cooperative organization as a prerequisite to the marketing, in its unmanufactured state, of agricultural commodities produced by the members of such farmers organization or group.

4. That plaintiff Oakesdale Grain Growers, Inc., erroneously paid the Excise Tax on Employers under the Federal Unemployment Tax Act in the following sums for the following years:

1940, \$21.83; 1941, \$23.79; 1942, \$43.11.

5. That plaintiff Colfax Grain Growers, Inc., erroneously paid the Excise Tax on Employers under the Federal Unemployment Tax Act in the following sums for the following years, to-wit:

1940, \$44.47; 1941, \$66.92; 1942, \$118.18.

6. That the services performed by employees of plaintiffs in handling processing, grading, storing, delivering to storage or to market or to a carrier for transportation to market of agricultural commodities are exempt from taxation under said Act.

From the Foregoing Findings of Fact the Court makes the following

Conclusions of Law

1. That plaintiff Oakesdale Grain Growers, Inc., is entitled to judgment against the United States of America in the sum of \$88.73.

2. That plaintiff Colfax Grain Growers, Inc., is entitled to Judgment against the United States of America in the sum of \$229.57.

3. That Defendant take nothing on its counter-claim against either of said plaintiffs.

Done in open Court this 25th day of June, 1945.

L. B. SCHWELLENBACH,
Judge of said District Court.

Presented by:

DONALD BURCHAM,
Attorney for Plaintiffs,
HARVEY ERICKSON.

In the District Court of the United States for the
Eastern District of Washington, Northern Division
Civ. 425

COLFAX GRAIN GROWERS, INC.,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA, and
CLARK SQUIRE, Collector of Internal Revenue at Tacoma, Washington,
Defendants,

and
Civ. 441

OAKESDALE GRAIN GROWERS, INC.,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA, and
CLARK SQUIRE, Collector of Internal Revenue at Tacoma, Washington,
Defendants.

MEMORANDUM OF THE COURT

I am convinced that the Plaintiffs are entitled to recover in these cases. The employees referred to were engaged in receiving wheat and other grain, either sacked or in bulk. They weighed and graded it and loaded it onto trucks or railroad cars. It is undisputed that the plaintiffs are non-profit co-operatives organized properly under the laws of the State of Washington. Congress, in the Act of August 10, 1939, excluded agricultural labor and

attempted to define agricultural labor as all service performed "in handling, planting, drying, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market any agricultural or horticultural commodity; but only if such service is performed as an incidence to ordinary farming operations." Sec. 1607 subd. 4. The phrase "but only if such service is performed as an incidence to ordinary farming operations" concededly requires interpretation. As it often the case, the necessity for such interpretation comes from the intentional legislative vagueness induced by expediency in the process of the legislative maneuvering. Gray, *Nature and Sources of the Law* (2d Ed.) 173. Interpretative regulations were characterized by Mr. Justice Jackson, in *White v. Winchester Country Club*, 315 U.S. 32, 41, as constructional crutches the value of which lies in the fact that they are "substantially contemporaneous expressions of opinion of men who were active in the drafting of the statute." See, also, *United States v. American Trucking Associations*, 310 U.S. 534, 542.

Faced with the necessity of interpreting this language, Regulation 107 of the Bureau of Internal Revenue, Sec. 403.208 (e) (1) was promulgated as follows:

"(e) Services described in section 1607 (1) (4) of the Act.—(1) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting,

drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity, other than fruits and vegetables . . . produced by such farmer or farmer-members of such organization or group of farmers are excepted, provided such services are performed as an incident to ordinary farming operations. Generally services are performed 'as an incident to ordinary farming operations' within the meaning of this 'paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by persons other than such farmer or members of such farmers' organization or group are not performed 'as an incident to ordinary farming operations.' "

Under the statute and regulation, the question posed is whether or not the services rendered by the employees of these plaintiffs are "services of the character ordinarily performed by the employees

of a farmer or of a farmers' cooperative organization as a prerequisite to the marketing in its unmanufactured state of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group." This question must be answered in the affirmative. Farm cooperatives in the United States universally engage in precisely the type of work performed by plaintiffs' employees. Defendants' counsel contend that the regulation should be limited in its interpretation to services performed by farm cooperatives in the actual operation of farms. So far as I know, North China is the only place in the world where farmers' cooperatives generally engage in such operations. (See "Cooperative Enterprise in Europe," a Report of the Inquiry on Cooperative Enterprises to the President, February, 1937; "The English Cooperatives," Elliott; Sanders, "Organizing a Farmers' Cooperative," Farm Credit Administration Cir. C-108, 1939).

Defendants protest that this interpretation would give to the farmers' cooperatives an unfair advantage over privately owned warehouses. Since the passage of the War Revenue Act of 1898, which exempted farmer cooperative associations from the payment of certain taxes, the Congress has given special statutory recognition to the important cooperatives forty-two times. See, "Legal Phases of Cooperative Associations," Hulbert, p. 307, et seq.; "Abstracts of the Laws pertaining to cooperatives," Ostrolenk and Tereshtenko, p. 315-340, inc. The

reasons behind these statutory distinctions between farmers' cooperatives and others were explained by the Supreme Court in *Tigner v. Texas*, 310 U.S. 141, as follows: "Since *Connolly's* case (*Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 22 S. Ct. 431, 431, 46 L.Ed. 679), was decided, nearly forty years ago, an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the anti-trust laws; have relieved their organizations from taxation.

* * * At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers." It is true that between 27 to 38% of the business of these plaintiffs was with non-members. That, however, does not change the situation. A similar question was raised in *Board of Trade of City of Chicago v. Wallace*, 7th Cir., 67 F. 2d 402, 407. The court there held that the standard of 50% set by the Congress in the *Capper-Volstead Act*, 7 U.S.C.A.

Sec. 291, subparagraph 3, controlled. For complete discussion of this question, see *Bowles v. Inland Empire Dairy Association*, 53 F. Supp. 210, 217.

Judgments will be entered for the plaintiffs in these cases.

L. B. SCHWELLENBACH,
United States District Judge.

June 20, 1945.

[Endorsed]: Filed August 22, 1949.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 28187-H

MARY R. BAIOCCHI,

Plaintiff,

vs.

OSCAR R. EWING, FEDERAL SECURITY AD-
MINISTRATOR,

Defendant.

OPINION

Plaintiff, widow of a former employee of the California Prune and Apricot Gowers Association, seeks to review the decision of the Social Security Administration, made upon plaintiff's application for herself and two minor children for survivors' insurance benefits under the Social Security Act of

August 14, 1935, and amendments (42 U.S.C.A. 401-409).¹ Her case is submitted on a Motion for Summary Judgment, there being no dispute as to the facts.

Plaintiff's husband was employed by the California Prune and Apricot Growers Association. This association is a co-operative corporation which will hereafter be called the Central Sales Agency. It serves as a marketing organization for twenty-eight local non-profit corporations, hereafter called Locals, through which individual grower members handle their produce.

The Central Sales Agency is a packing and processing corporation dealing only with dried fruits which it receives from the Locals in a sulphured, dried state. It handles about one-third of the prunes in California. It has sixteen plants for receiving, grading, packaging and shipping prunes. It is almost twice as large as any of its competitors. It employs processors, packers, clerical personnel, public relations personnel and executives. It does not own any farm, orchard or ranch; it neither raises produce nor harvests any fruit. The plant, in which decedent worked, is located in a heavy industrial area in San Jose. Its operations are identical with those of the Rosenberg Brothers Corporation. (See *Miller v. Burger*, *infra*.)

When Locals turn dried fruit over to the Central Sales Agency the fruit is in a merchantable state.

¹See 42 U.S.C.A. 409-G; 42 U.S.C.A. 402(e); 42 U.S.C.A. 402(c).

Title to the fruit passes to the Central Sales Agency upon delivery from the Locals, which acquire it from the individual members of the corporations. Payment of the purchase price is postponed, but it is fixed and the Central Sales Agency is subject to account to the Locals according to contract, by-laws and statute. Fruit sometimes remains in storage at the Central Sales Agency for as long as eighteen months. It is sold under its own brands and also under private brands owned by its customers. When dried fruit leaves the packing plant it is in the same condition as when it is sold to the housewife. About 40% of the carton pack is sold to chain stores; about 75% of the bulk is sold to chain stores and super markets.

Specifically, the functions performed by the decedent for the Central Sales Agency were: (1) receiving and grading; (2) processing and packing; (3) shipping; (4) maintenance.

The Central Sales Agency for more than twelve years has made payments of taxes and collected contributions from employees in accordance with the provisions of the Social Security Act. It has acted voluntarily to protect its employees, convinced that their work falls within the coverage of the Act. The instant case is not brought at the behest of the cooperative but is necessitated by the interpretation placed upon social security coverage by the Administration.

The specific question for decision is whether plaintiff's deceased husband was an employee of an

organization included within the terms of the Social Security Act.

The pertinent part of the Social Security Act whose coverage is in dispute defines agricultural labor as follows:

“The term ‘agricultural labor’ includes all services performed . . . (4) in handling, packing, packaging, processing, freezing, grading, storing, or delivery to storage or to market or to a carrier for transportation to market any agricultural or horticultural commodity; but only as such service is performed as an incident to ordinary farming operations or, in the case of fruits or vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.” (42 U.S.C.A. 409 (b)). (Underscore ours.)

Did the decedent, whose work in the packing house in San Jose consisted of receiving, grading, processing and packing dried fruit for purposes of preparing it for sale to chain stores, cooperatives, and super markets, and doing maintenance work, constitute agricultural labor within the above definition of the Social Security Act?

From the undisputed statement of facts, it is clear decedent worked for a terminal market for distribution for consumption after the dried fruit had reached the grocer’s or terminal market.

In construing legislation, such as the Social Security Act, it is axiomatic that the Court should be liberal in its interpretation (*Grace v. Magruder*, 148 Fed. 2d, 679; *Latimer v. U. S.*, 52 Fed. Supp. 228; *Burger v. Social Security Board*, 66 Fed. Supp. 619). Furthermore, this Court is free to make its own determination of the scope of the Statute (*Social Security Board v. Nierotko*, 327 U. S. 358).

The task of analyzing and construing the sections of the Social Security Act, whose meaning gives rise to the present controversy, has been simplified by two recent rulings by the Court of Appeals for the Ninth Circuit. In cases which closely parallel the instant suit, the Appellate Court has held that work performed in employment identical with that of decedent in a processing and packaging plant is "covered" employment within the meaning of the Social Security Act. This is the holding in *Miller v. Burger*, 161 Fed. 2d 992, and *Miller v. Bettencourt*, 161 Fed. 2d, 995. In the Bettencourt case the Court held that the plant in which Bettencourt worked was a "terminal market" for the farmer producers who sold and delivered their dried fruit to that concern. As the Court stated at p. 994: "Facts make abundantly clear that it was only after the farmer producer sold and delivered the fruit to Rosenberg Brothers, that Bettencourt's services . . . were performed for that commercial concern. In this state of the record we regard his services as being performed after all 'agricultural labor' in connection with such dried fruit had ceased." Ac-

cordingly, the Court found that the plaintiff was entitled to coverage under the Social Security Act, affirming Judge Mathes and referring to his opinion in *Burger v. Security Board*, *supra*.

The only basis urged for distinguishing the case at bar from the *Burger* and *Bettencourt* cases is the cooperative status of the Central Sales Agency for whom plaintiff's deceased husband worked. This distinction is not sound. In *North Whittier Heights Citrus Association v. National Labor Relations Board*, 109 Fed. 2d, 76, the Court of Appeals for the Ninth Circuit held that a cooperative similar to that for which decedent worked was not one engaged in agriculture to such an extent that its employees would be considered "agricultural laborers" within the exemptions of the National Labor Relations Act. The reasoning in the *North Whittier* case applies with equal force herein.

The Social Security Act makes no distinction between cooperatives and other forms of corporations in defining its coverage. While defendant has explored the possibility of making out a technical case in favor of its position, viz. that employees of the Central Sales Agency are indirectly employees of the individual farmer members who belong to the local cooperatives, this Court is not prepared to base its decision on strained legal niceties. Even on the distinguishing features which defendant seeks to emphasize between the Central Sales Agency and a profit corporation, there is authority for holding that the attributes of the two types of

corporations are similar for many legal purposes, including coverage under social security legislation. See *California Employment Commission v. Butte County Association*, 25 Calif. 2d, 624, 154, P. 2d 892.

The basic reason for excluding agricultural laborers from coverage of the Act is to be found in the solicitude of Congress for the small farmer who is ill-equipped to maintain complex records on laborers who are hired on a strictly seasonal basis. Obviously the Central Sales Agency, which employs as many as 1500 workers and has a complete accounting staff is not in the category of the individual farmer who requires freedom from bookkeeping responsibilities.

The Court concludes that plaintiff's deceased husband was employed in a plant whose workers are covered by the Social Security Act. Plaintiff is entitled to recover on behalf of herself and her two minor children as prayed for, upon preparation of findings of fact and conclusions of law in accordance with this opinion.

Dated: December 8, 1949.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed December 9, 1949.

[Title of District Court and Cause.]

ORDER

The above-entitled action came on to be heard on the motion of the plaintiff for a summary judgment there being no dispute as to the facts; the plaintiff being represented by Arthur L. Johnson and Robert Morgan and the defendant, Oscar R. Ewing, Federal Security Administrator, appearing by Frank J. Hennessy, Charles E. Collett and Newell A. Clapp, and Edward H. Hickey, Hubert H. Margolies and L. B. Zeisler appearing of counsel; the matter having been submitted on briefs, the Court being fully advised in the premises,

It is Hereby Ordered, Adjudged and Decreed:

1. The plaintiff's motion for summary judgment be and it is granted.

2. The decision of the Social Security Administration is reversed and the cause is remanded with directions to recompute the benefits to which the plaintiff and her minor children are entitled under the Social Security Act and in accordance with the opinion herein rendered.

Dated this 10th day of January, 1950.

/s/ GEORGE B. HARRIS,

United States District Judge.

Approved as to form, as provided in Rule 5(c).

FRANK J. HENNESSY,

United States Attorney,

By /s/ C. ELMER COLLETT.

[Endorsed]: Filed January 11, 1950.

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 28187-H

MARY R. BAIOCCHI,

Plaintiff,

vs.

OSCAR R. EWING, FEDERAL SECURITY
ADMINISTRATOR,

Defendant.

SUMMARY JUDGMENT

The above-entitled action came on to be heard on the motion of the plaintiff for a summary judgment there being no dispute as to the facts; the plaintiff being represented by Arthur L. Johnson and Robert Morgan and the defendant, Oscar R. Ewing, Federal Security Administrator, appearing by Frank J. Hennessy, Charles E. Collett and Newell A. Clapp, and Edward H. Hickey, Hubert H. Margolies and L. B. Zeisler appearing of counsel; the matter having been submitted on briefs, the Court being fully advised in the premises and the Court having entered its order herein granting the plaintiff's motion:

It is Hereby Ordered, Adjudged and Decreed that the decisions of the Federal Security Agency, Social Security Administration, upon the applications of the plaintiff on behalf of herself and her two minor

children for her widow's current insurance benefit and for minor children's benefits, #12-1093, 12-1094, and 12-1095 are hereby set aside and reversed and the said cases remanded to the Social Security Administration.

Dated this 10th day of January, 1950.

/s/ GEORGE B. HARRIS,
United States District Judge.

Approved as to form, as provided in Rule 5(c).

FRANK J. HENNESSY,
United States Attorney,
By /s/ C. ELMER COLLETT.

Entered in Civil Docket Jan. 11, 1950.

[Endorsed]: Filed January 11, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the defendant, Oscar R. Ewing, Federal Security Administrator, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Order and Summary Judgment entered by the United States District Court for the Northern District of California, on January 11, 1950, reversing and setting aside the decisions of the Federal Security Agency, Social

Security Administration, Nos. 12-1093, 12-1094 and 12-1095.

Dated February 14, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney,
/s/ C. ELMER COLLETT,
Assistant U. S. Attorney.
Attorneys for Defendant.

[Endorsed]: Filed February 15, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The defendant, having taken an appeal from the Order and Summary Judgment made and entered herein on January 11, 1950, to the United States Court of Appeals for the Ninth Circuit, hereby designates the following parts of the record and proceedings for inclusion in the record on appeal:

1. Complaint for Review of Decision of Social Security Administration;
2. Answer, including the transcript of the administrative record made a part thereof;
3. Plaintiff's motion for summary judgment;
4. Opinion of George B. Harris, United States District Judge, filed December 9, 1949;

5. Order granting motion for summary judgment filed January 11, 1950.

6. Summary judgment filed January 11, 1950.

7. Affidavit in opposition to plaintiff's motion for attorneys fees, of Joseph E. McElvain, together with attachments thereto, filed August 22, 1949.

8. Notice of Appeal.

9. Designation of the Record.

Dated: February 14, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney.
Attorneys for Defendant.

[Endorsed]: Filed February 15, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON
BY DEFENDANT ON APPEAL

The defendant, having taken an appeal on February 14, 1950, to the United States Court of Appeals for the Ninth Circuit from the Order and Summary Judgment made and entered herein by the United States District Court on January 11, 1950, hereby makes the following statement of points to be relied upon in the prosecution of said appeal:

The District Court erred :

1. In failing to hold that the services performed by the deceased wage earner Almando Baiocchi for the California Prune and Apricot Growers Association were properly considered by the Federal Security Administrator to be "agricultural labor" as defined in Section 209 (1) (4) of the Social Security Act as amended (42 U.S.C. 409 (1) (4)) and in the corresponding tax statute. Chapter 9A of the Internal Revenue Code, 26 U.S.C. 1426(h) (4), so that payments he received therefore subsequent to December 31, 1939, were properly excluded from wage credits.

2. In holding that the California Prune and Apricot Growers Association was a terminal market for distribution for consumption.

3. In holding that the deceased wage earner's work was performed after the dried fruit had reached (a) the grower's market or (b) the terminal market.

4. In holding that the court was free to make its own determination of the scope of the Statute without proper regard for the practice evolved by the Federal Security Agency and the Bureau of Internal Revenue in coordinating the administration of the tax and benefit provisions, which had a reasonable basis in law.

5. In concluding that the decisions of this Court in *Miller v. Burger*, 161 F. (2d) 992, and *Miller v. Bettencourt*, 161 F. (2d) 995, dealing with the

workers of a commercial handler purchasing fruit outright, are controlling with respect to the coverage of workers of a nonprofit farmers cooperative organized for the sole purpose of marketing their crop, i.e., disposing of the farmer's crop for him.

6. In substituting its own views of "agricultural labor" for the statutory definition adopted by Congress for Title II of the Social Security Act and the corresponding tax provisions.

7. In substituting the views of this Court in *North Whittier Heights Citrus Association v. National Labor Relations Board*, 109 F. (2d) 76, for the statutory definition adopted by Congress for Title II of the Social Security Act.

8. In disregarding the Federal Security Administrator's findings and finding independently and without support in the record that when locals turn dried fruit over to California Prune and Apricot Growers Association (1) it is in a merchantable state and (2) payment of the purchase price is then fixed although postponed.

9. In holding that the Social Security Act makes no distinction between nonprofit farmers cooperatives and commercial handlers, and thereby (a) nullifying the exception of services such as grading, processing and packing, incident to the preparation of fruits and vegetables for market, without regard to the Congressional purpose as established by the legislative history of the 1939 amendments to the Social Security Act and to the respect due

the expertness of the Federal Security Agency, and (b) invalidating the Regulations promulgated by the Social Security Administration.

10. In not holding that the farmer's economic concern over the return on his fruit is not at an end when his fruit reaches the cooperative and that he has not "parted with economic interest in its future form of destiny."

11. In not holding that the California Prune and Apricot Growers Association was an agent rather than a buyer or middleman, and that services for the Association were for the account of the growers.

12. In permitting the coverage of Title II of the Social Security Act and its artificial statutory definition of "agricultural labor" to be extended by the voluntary contributions of the California Prune and Apricot Growers Association.

13. In mistakenly assuming that the basic reason for excluding processing workers from coverage under the 1939 amendment to the Social Security Act was the difficulty the small farmer has in keeping records instead of the desire to relieve the smaller farmer from the impact and incidence of taxes imposed on fruit and vegetable processing which might be passed back to him, although large growers doing their own processing would not be subject to employment taxation and would thereby obtain a competitive advantage.

14. In granting plaintiff's motion for summary judgment, denying defendant's motion, and in reversing and remanding the cause.

Dated: February 14, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed February 15, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Review of Decision of Social Security Administration

Answer.

Certification of Federal Security Administration.
Motion for Summary Judgment.

Affidavit in Opposition to Plaintiff's Motion for Attorney's Fees.

Opinion.

Order.

Summary Judgment.

Notice of Appeal.

Designation of Record on Appeal.

Statement of Points to Be Relied on by Defendant on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of March, A.D. 1950.

C. W. CALBREATH,

Clerk,

[Seal] By /s/ M. E. VAN BUREN,

Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF FEDERAL SECURITY
ADMINISTRATOR

I, Joseph E. McElvain, Chairman, Appeals Council, Social Security Administration, Federal Security Agency, under authority conferred upon me by the Federal Security Administrator, hereby certify that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings relating to the claim of Mary R. Baiocchi on her own behalf for widow's current insurance benefits and on behalf of Leola D. and Geraldine Baiocchi for child's insurance benefits under Title II of the Social Security Act, as amended, based

14. In granting plaintiff's motion for summary judgment, denying defendant's motion, and in reversing and remanding the cause.

Dated: February 14, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed February 15, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Review of Decision of Social Security Administration

Answer.

Certification of Federal Security Administration.

Motion for Summary Judgment.

Affidavit in Opposition to Plaintiff's Motion for Attorney's Fees.

Opinion.

Order.

Summary Judgment.

Notice of Appeal.

Designation of Record on Appeal.

Statement of Points to Be Relied on by Defendant on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of March, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF FEDERAL SECURITY
ADMINISTRATOR

I, Joseph E. McElvain, Chairman, Appeals Council, Social Security Administration, Federal Security Agency, under authority conferred upon me by the Federal Security Administrator, hereby certify that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings relating to the claim of Mary R. Baiocchi on her own behalf for widow's current insurance benefits and on behalf of Leola D. and Geraldine Baiocchi for child's insurance benefits under Title II of the Social Security Act, as amended, based

on the wages of the wage earner, Almando Baiocchi, such transcript including application for benefits, testimony and evidence upon which the decision of the Referee of the Appeals Council of the Social Security Administration was based.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of letter dated June 29, 1948, addressed to claimant (plaintiff) enclosing copy of Appeals Council's Denial of Request for Review of Referee's Decision.

(2) Copy of Denial of Request for Review.

(3) Copy of Request for Review of Referee's Decision.

(4) Copy of letter dated June 8, 1948, addressed to claimant (plaintiff) enclosing copy of Referee's Decision.

(5) Copy of Referee's Decision.

(6) Copy of letter dated May 20, 1948, addressed to referee by Arthur L. Johnson, Attorney at Law, relating to waiver of ten-day notice of hearing.

(7) Copy of Request for Hearing.

(8) Copy of Transcript of Hearing held on May 26, 1948.

The following documents are attached to the above-mentioned transcript as exhibits introduced in evidence before the referee:

(9) Copy of Application of Widow, and Widow on Behalf of Child, for Survivors Insurance Benefits dated July 18, 1945. (Exhibit A)

(10) Copy of Social Security Administration Wage Record of A. Baiocchi. (Exhibit B)

(11) Copy of Request for Reconsideration dated November 8, 1947. (Exhibit C)

(12) Copy of wage record of Almando Baiocchi for services rendered the California Prune and Apricot Growers Association from February 1, 1941, to and including November 4, 1944. (Exhibit D)

(13) Copy of letter dated March 26, 1948, addressed to claimant (plaintiff) by Joseph C. Columbus, Chief, Area Office. (Exhibit E)

(14) Copy of Report of Contact dated April 28, 1948, with Thomas Miller, Secretary, California Prune and Apricot Growers Association. (Exhibit F)

(15) Copy of letter dated April 29, 1948, addressed to the Social Security Administration by T. O. Kluge, General Manager, California Prune and Apricot Growers Association. (Exhibit G)

(16) Copy of statement of earnings of claimant (plaintiff) for services rendered Richmond-Chase Company from 1945 to 1947, inclusive, together with statement of earnings of Leola and Geraldine Baiocchi for U. S. Products Company and Hershel Company in 1945, 1946 and 1947. (Exhibit H)

(17) Copy of letter dated October 22, 1947, addressed to Social Security Administration by T. O. Kluge, General Manager California Prune and Apricot Growers Association. (Exhibit I)

(18) Copy of letter dated May 25, 1948, addressed to Mr. Arthur L. Johnson by R. G. Wells, Personnel Director, California Prune and Apricot Growers Association. (Exhibit J)

(19) Copy of Prune Marketing Agreement for use by California Prune and Apricot Growers Association and Grower. (Exhibit K)

(20) Copy of Local-Central Contract used by California Prune and Apricot Growers Association. (Exhibit L)

(21) Copy of photograph of Plant No. 11 of California Prune and Apricot Growers Association located in San Jose, California. (Exhibit M)

(22) Copy of mimeographed copy of Treasury Department Coll. No. 6219 dated December 31, 1947. (Exhibit N)

(23) Copy of mimeographed copy of Treasury Department Coll. No. 6239 dated March 1, 1948. (Exhibit O)

(24) Copy of Federal Rulings Affecting Sub-chapters A and C, Chapter 9, of the Internal Revenue Code, 487-S.S.T. 405. (Exhibit P)

(25) Copy of Federal Rulings Affecting the Social Security Act, 8-S.S.T. 10. (Exhibit Q)

(26) Copy of Decision and Notice of Decision of Appeals Council, Social Security Administration, Federal Security Agency, in the case of Edgar T. Penn, Case No. 12-139, issued July 15, 1947. (Exhibit R)

(27) Copy of Decision and Notice of Decision of Appeals Council, Social Security Administration, Federal Security Agency, in the case of Marguerite K. Grimley, Case No. 12-92, issued July 16, 1947. (Exhibit S)

(28) Copy of Revised Decision and Notice of

Decision of Appeals Council, Social Security Administration, Federal Security Agency, in the case of Marguerite K. Grimley, Case No. 12-92, issued May 14, 1948.

(29) Copy of Articles of Incorporation and By-Laws of California Prune and Apricot Growers Association with certification by Secretary dated June 1, 1948. (Exhibit U)

(30) Copy of Articles of Incorporation and By-Laws of Glenn County Prune and Apricot Growers, Inc. with certification of Secretary of California Prune and Apricot Growers Association dated June 1, 1948. (Exhibit V)

In Witness Whereof, I have hereunto set my hand and caused the seal of the Federal Security Agency to be affixed in the City of Washington, District of Columbia, this 9th day of September, 1948. By direction of the Federal Security Administrator.

[Seal] /s/ JOSEPH E. McELVAIN,

Chairman, Appals Council, Social Security Administration, Federal Security Agency.

Federal Security Agency
Social Security Administration
Washington Zone 25

09:AC

June 29, 1948 .

In the Case of Mary R. Baiocchi and on behalf of
Leola D. and Geraldine Baiocchi, Claimants;
Almando Baiocchi, Wage Earner; Social Se-
curity Account No. 552-14-0672.

Mrs. Mary R. Baiocchi
221 Cleaves Avenue
San Jose, California

Dear Mrs. Baiocchi:

There is enclosed herewith a copy of the Appeals Council's denial of your Request for Review of the referee's decision on your claims for widow's current insurance benefits and for child's insurance benefits on behalf of Leola D. Baiocchi and Geraldine Baiocchi. Your Request for Review having been denied, the referee's decision stands as the final decision of the Office of Appeals Council, Social Security Administration, Federal Security Agency.

If you desire a review of the referee's decision by a court, you may file a civil action in the district court of the United States in the judicial district in which you reside within sixty days from this date. For your information as to the action in the

district court, your attention is directed to section 205(g) of the Social Security Act, as amended.

Sincerely yours,

JOSEPH E. McELVAIN,

Chairman.

Enclosure

c/o Referee Tieburg

F. O. San Jose, California

Mr. Arthur L. Johnson

Attorney-at-Law

202 Porter Building

2nd and Santa Clara Streets

San Jose 20, California

mp:mp

740890

Registered

[Sent] [1*]

Federal Security Agency
Social Security Administration
Office of Appeals Council

Denial of Request for Review

In the Case of Mary R. Baiocchi (Claimant), Case No. 12-1093. Claim for Widow's Current Insurance Benefits.

In the Case of Mary R. Baiocchi on Behalf of Leola D. Baiocchi (Claimant), Case No. 12-1094. Claim for Child's Insurance Benefits.

* Page numbering appearing at top of page of original certified Transcript of Record.

In the Case of Mary R. Baiocchi on Behalf of
Geraldine Baiocchi (Claimant), Case No.
12-1095. Claim for Child's Insurance Benefits.

In the Case of Almando Baiocchi (Wage Earner),
Social Security Account No. 552-14-0672.

These cases are before the Appeals Council upon
the claimant's Request for Review of the Referee's
Decision, rendered on the 8th day of June, 1948. We
are of the opinion that a review of the referee's deci-
sion would result in no advantage to the claimants;
therefore, the Request for Review is hereby denied.

OFFICE OF APPEALS
COUNCIL,

/s/ JOSEPH E. McELVAIN,
Chairman.

Date: June 29, 1948.

ERB—6/29/48.

Federal Security Agency
Social Security Board

Office of Appeals Council

Request for
Review of Referee's Decision

In the Case of Mary R. Baiocchi (Claimant);
Almando Baiocchi (Wage Earner), Social Se-
curity Account No. 552-14-0672). Claim for
Widow's Current Insurance Benefits and Minor
Children's Benefits.

To the Appeals Council:

I disagree with the referee's decision on the above claim and request that the Appeals Council review it.

Remarks: (If you wish you may use this space for statement of reasons for disagreement.)

I contend that all of my deceased husband's work was not agricultural work in any sense for the reasons set forth in my "Request for Hearing," dated May 4, 1948, which reasons are hereby re-affirmed and incorporated herein as if here set forth in full.

/s/ MARY R. BAIOCCHI,
221 Cleaves Avenue,
San Jose, California.

/s/ ARTHUR L. JOHNSON,
Attorney for Applicant and the other wage earners
affected by the decision, and their dependents.

Date June 10, 1948. [2]

Acknowledgment of Request for
Review of Referee's Decision

Your request for review of the referee's decision in this case was filed on June 11, 1948, at San Jose, Calif. The Chairman of the Appeals Council will notify you of the Council's action on your request.

(For the Social Security Board.)

By /s/ JOHN J. CASSIDY,
Manager,
San Jose, California.

To Appeals Council. [3]

Administration
Case 12-1093-94-95
CO:RO:XII

Notice of Decision

443 Federal Office Building
80 Fulton Street
San Francisco 8, California
June 8, 1948.

Mrs. Mary R. Baiocchi
221 Cleaves Avenue
San Jose, California

Dear Mrs. Baiocchi:

Enclosed is a copy of my decision in your case which is that you are not entitled to the Widow's Current Insurance Benefits and Child's Insurance Benefits for which you applied.

If you disagree with my findings of fact or application of the law, as stated in this decision, you may request that it be reviewed by the Appeals Council of the Social Security Administration. Such request, however, must be made in writing and filed within thirty days from the date of this letter, and may be filed at any field office of the Social Security Administration.

If you have any question about this decision, or desire further information regarding its review, I

suggest that you write to or call at the nearest field office of the Social Security Administration.

Sincerely yours,

/s/ MARTIN TIEBURG,

Referee.

Enclosure

cc: Mr. Arthur L. Johnson

San Jose, California

Mr. Gerald H. Hagar

Oakland, California

Appeals Council, Washington, D. C.

San Francisco Area Office

Field Office, San Jose, California. [4]

Federal Security Agency
Social Security Administration

Office of Appeals Council

REFEREE'S DECISION

In the Case of Mary R. Baiocchi (Claimant), Case No. 12-1093. Claim for Widow's Current Insurance Benefits.

In the Case of Mary R. Baiocchi on Behalf of Leola D. Baiocchi (Claimant), Case No. 12-1094. Claim for Child's Insurance Benefits.

In the Case of Mary R. Baiocchi on Behalf of Geraldine Baiocchi (Claimant), Case No. 12-1095. Claim for Child's Insurance Benefits.

In the Case of Almando Baiocchi (Wage Earner), Social Security Account No. 552-14-0672.

Mary R. Baiocchi, claimant herein on her own behalf, and on behalf of her children Leola D. Baiocchi and Geraldine Baiocchi, disagreed with the determination of the Bureau of Old-Age and Survivors Insurance of the Social Security Administration, by which determination her application for benefits was disallowed and filed a request for a hearing before a referee of the Social Security Administration. Such a hearing was held before the undersigned referee in San Jose, California, on May 26, 1948. The record was thereafter reopened to allow introduction thereunto of additional documentary evidence received. The claimant was personally present at the hearing and participated therein, together with her duly appointed legal representative, Mr. Arthur L. Johnson. Mr. T. O. Kluge and Mr. R. G. Wells, being the general manager and personnel director, respectively, of the California Prune and Apricot Growers Association, were present and participated in the hearing, together with Mr. Gerald H. Hagar, of the law firm of Hagar, Crosby & Crosby, attorneys for the Association, was also present and participated in the hearing.

The claimant contends that the service rendered by her husband for the California Prune and Apricot Growers Association were in covered employment and that all of his earnings from such employment should be credited by the Social Security Administration as wages as a result whereof the wage earner would have at the time of his death a fully insured status.

The benefits applied for by the claimant on behalf of her children are provided for in section 202(c) of the Social Security Act, as amended, and the benefits [5] applied for by the claimant on her own behalf are provided for in section 202(e). The claimant, on her own behalf and on behalf of her children, has satisfied all of the conditions of entitlement under those sections, with the exception of those conditions which require that the wage earner have been, at the time of his death, a fully or currently insured individual.

“Fully insured individual” is defined in section 209(g) and for the purposes of this case, based upon the wage earner’s death on July 8, 1945, to constitute him a fully insured individual he would have required seventeen calendar quarters of coverage.

“Currently insured individual” is defined in section 209(h) and under the provisions of that section the wage earner, in order to be so insured, required six quarters of coverage of the twelve calendar quarters elapsing immediately preceding the calendar quarter in which the wage earner died.

The record in this case discloses that the wage earner performed services for the California Prune and Apricot Growers Association, commencing in the latter part of 1939, to and including approximately November 4, 1944. Over that period he performed services in four separate functions of the operations of the Association, which functions were as follows: (1) Processing and packing; (2) Re-

ceiving and grading; (3) Shipping; and (4) Maintenance. All of the wages received for such services since and including the year 1940 are subject to the determination herein to be made, excepting that under the provisions of section 205(c)(2) the statute of limitations has operated against the wage reportings and credits on the wage record of this wage earner for the year 1940 and cannot be altered, deleted or changed as a result of this decision. As regards all employment for this Association prior to 1940, the services were admittedly rendered in employment under the Social Security Act and its interpretation then in effect. Since 1940, the wage earner, in numerous pay periods, performed maintenance services which constituted more than one-half of all services rendered for the Association during such pay period and therefore his entire earnings for such pay period were credited as wages under the provisions of 209(c). After crediting the wage earner with all earnings prior to 1939 and during 1940 and all pay periods subsequent to 1940, during which periods his services for the Association in maintenance work constituted more than fifty per cent of the services rendered during such pay period, the referee finds, as the record shows, that the wage earner had fourteen calendar quarters of coverage towards the seventeen quarters of coverage required for a fully insured status and had two quarters of coverage towards a currently insured status.

For the purposes of this case we will concern

ourselves only with services performed by the wage earner in the functions of: (1) Processing and packing; (2) Receiving and grading; and (3) Shipping. The Bureau has held that such services were in agricultural labor and as such were excluded from employment, and the remuneration received by the wage earner therefor cannot be credited as wages. That presents the very issue to be determined at this time.

The California Prune and Apricot Growers Association, the employer in question here, is a cooperative association made up of approximately 5,000 growers whose growing [6] activities are in California and in the main confined to the area between Red Bluff on the north and the Tehachapi Mountains in the south. This is what is generally known as Central California, in which large area are situated the San Joaquin and Sacramento Valley. The 5,000 some odd growers referred to are not directly members of the California Prune and Apricot Growers Association, hereinafter referred to as "Association," but are members of twenty-eight local associations, each independent from the other, which local associations, in turn, are members of the Association. Each one of these locals has its own organization and elects representatives of itself to become members of the Association. None of these local associations own any physical properties. All the physical properties utilized for packing and distribution of produce are owned by the Association. The Association has eighteen plants situated

at various points over its service area in the state but San Jose is the principal place of business of the Association, wherein are situated eight plants. The Association's head offices are also situated in San Jose.

The Association handles prunes, peaches, apricots, apricot pits and nectarines, in approximately that order of importance or volume. All of the fruits handled by it are dried fruits. Of the total volume of business handled by the Association, approximately eighty-five per cent is in prunes. For our purposes, it appears that it will not be necessary to consider this Association other than in its prune production, since that is its principal business and will substantially reflect its operations in the other products enumerated.

At appears that the region in question, to wit, the Central California region, produces and distributes approximately 90% of all prunes produced and distributed in the United States and of the total prune production the Association handles approximately one-third or more. The remaining two-thirds of prunes produced and distributed are handled by commercial packers, consisting of from twenty to thirty-five concerns. The Association handles almost twice as much in volume in the prune business as its closest competitor.

The grower brings his prunes to one of the packing houses operated by the Association and upon delivery and inspection thereof by the Association is given a receipt for such delivery. At the time the receipt is given, the fruit is received and the matter

is reported to the accounting office of the Association, and the grower is paid an "advance payment," which is 65% of the field price which prunes are then bringing. Thereafter and until the seasonal pack is totally sold, progress, accountings and payments are made, and, at the time the entire seasonal pack is sold, the grower is given a final accounting and payment for prunes delivered to the Association in that season. The prunes, upon receipt are co-mingled with all other prunes in the packing house and are shipped as orders are received. Consequently, the prunes may remain in the packing house anywhere from two months to eighteen months, depending on the size of the pack and the condition of the prune market. So, it appears that in some instances a grower may wait as long as eighteen months for his final payment and accounting. After the prunes are delivered by the grower to the Association, he loses all control over them physically and under the contract he has with the local association, of which he is a member, he parts with sufficient title in those prunes to the Association to allow the Association to handle those prunes as outright owner. In this regard, the Association is empowered to borrow money, giving the prune pack in its possession as security therefor and do all of the things necessary or proper that any person, who is the outright owner of produce, might do with such prunes. However, it appears from the manner in which the title is handled that the grower continues carrying economic risk, as it cannot be determined [7] what he will receive for his crop until

the entire seasonal crop of all member growers is sold in full. In this regard, the transfer of the prunes from the grower to the Association differs from the transfer of produce from a grower to a commercial packer who purchases the produce outright at a market price, or any other price agreed upon between the grower and the commercial packer.

As stated previously, with the exception of apricot pits, this Association deals only in dried fruits. The fruits are harvested on the farms or orchards of the grower and after harvesting, are dehydrated for the grower, at his own expense. It appears from the records available that 85% of the fruit brought to this Association has been dehydrated for the grower by commercial dehydrating plants and the cost thereof has been paid to such dehydrators by the grower. No dehydration process whatsoever is performed by the Association. When the produce is brought by the grower in dehydrated form to the Association and after it has been weighed, it is first tested to determine its perishability. If the produce does not meet the standards of the Association in this regard, it is rejected by the Association. Upon acceptance by the Association it is placed in bins after it has been graded and remains in those bins until it is ready to be packed. Before packing the produce is sterilized and with the exception of the actual packing operation that is the only process performed on the fruit by the Association. None of the fruit is packaged until an order therefor is received by the Association. Generally, the Association

engages in two types of packing, to wit: (1) "Carton" pack, and (2) "bulk" pack. These two types or categories are in turn divided into numerous categories consisting of the types and sizes of cartons, boxes, barrels, etc., employed. The "carton" pack referred to is the pack generally prepared for the consuming trade. About 40% of the total prunes packaged are "carton" packed and the balance is "bulk" packed. Of the "carton" pack, approximately 40% of the sales made by the Association are directly to large retail organizations, such as chain stores, super markets, etc., which organization, in turn, sells directly to the consuming public. The balance of the "carton" pack is sold to wholesalers. Approximately 75% of the "bulk" pack is distributed through wholesalers.

From the evidence in this record it appears that this Association performs its functions and handles its produce substantially identical to the manner and method utilized by Rosenberg Brothers, a commercial packer. Rosenberg Brothers was the employer involved in the case of *Miller vs. Burger*, 161 Fed. 2d. 992, in which case it was held that a processor of dried fruit was not engaged in agricultural labor.

"Agricultural labor" is defined in section 209 (1) which reads, in part, as follows:

"The term 'agricultural labor' includes all service performed—

"(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivery to storage or to market or to a carrier for

transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning [8] or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. . . .”

The Social Security Administration has determined that the principals enunciated in the *Burger* case, (*supra*), do not establish a basis for a finding that an individual rendering processing services for a cooperative association is engaged in “employment” within the contemplation of the Social Security Act, as amended. The position taken by the Administration is to the effect that services on and after January 1, 1940, in the handling, packing, packaging, processing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of dried fruit, as well as fresh fruit and fresh vegetables, which such handling is for the account of the producer (i.e., where the processor, whether a cooperative or a commercial handler, operates on a fee basis and does not buy the producer’s product outright), are excepted services under section 209(1)(4) of the Social Security Act, as amended.

The referee, accordingly, finds that the services rendered by the wage earner since January 1, 1940, as a dried fruit processor, excluding services rendered as a maintenance man, for the California Prune and Apricot Growers Association, a cooperative association, are excepted as "agricultural labor" under section 209(1)(4) of the Social Security Act, as amended.

There is evidence in this record that the claimant and also her daughters have, at times, since the date of the death of the wage earner, rendered services in covered employment which would subject their respective benefits to deductions for some months under the provisions of section 203(d)(1). However, since it has been found that no benefits were payable, the referee makes no specific finding as to any particular months in which the benefits of any of the beneficiaries are subject to deductions under the provisions of section 203(d)(1).

Is it therefore the decision of this referee that claimant, on her own behalf, and on behalf of her two children, is not entitled to the widow's current insurance benefits and the child's insurance benefits for which she has applied.

/s/ MARTIN TIEBURG,
Referee.

Date: June 8, 1949. [9]

Arthur L. Johnson
Attorney at Law
202 Porter Bldg.,
2nd and Santa Clara Sts.
San Jose 20, California

May 20, 1948.

Hon. Martin Tieburg,
Referee, Social Security Administration,
443 Federal Office Bldg.,
San Francisco 2, California.

Dear Mr. Tieburg:

In ref: Claim of Mary R. Baiocchi,
No. 552-14-0672.

Mindful of your regulations requiring ten days' notice for hearings I am writing this to waive this requirement on behalf of the claimant, who will be prepared to proceed with the hearing at 1:30 p.m. on next Wednesday, May 26, 1948, at the Social Security Administration offices in the Commercial Bldg., San Jose, California, in accordance with arrangements made by long distance telephone.

Thanking you for your cooperation in this matter, I remain,

Very sincerely yours,

/s/ ARTHUR L. JOHNSON.

ALJ:W

- C.C. to: 1. Mr. T. O. Kluge,
General Manager,
California Prune & Apricot
Growers Association,
Market & San Antonio Streets,
San Jose 5, California.
2. Mrs. Mary R. Baiocchi,
221 Cleaves Avenue,
San Jose, California.
3. Mr. John J. Cassidy,
Manager, Social Security Administra-
tion,
Commercial Bldg.,
San Jose, California. [9-A]

Federal Security Agency
Social Security Administration
Office of Appeals Council

Request for Hearing

In the case of Mary R. Baiocchi, Claimant, Al-
mando Baiocchi, Wage earner, 552-14-0672,
Social Security Account number.

Claim for: Widow's Current Insurance Benefits
and Minor Children's Benefits.

To the Social Security Administration:

I disagree with the determination made on the
above claim, and therefore request a hearing be-

fore a referee of the Social Security Administration. If convenient, I would like to have this hearing held on or about May 18, 1948, at or near San Jose, California.

Remarks: I claim that my deceased husband's work was not agricultural in any sense, that it comes squarely within the decisions of the U. S. District Courts in the cases of Bettencourt vs. Social Security Board, 66 Fed. Supp. 629, and Burger vs. Social Security Board, 66 Fed. Supp. 619, and of the U. S. Circuit Court of Appeals in the cases of Miller vs. Bettencourt, 161 F. 2d 995, and Miller vs. Burger, 161 F. 2d 992 (June 5, 1947) as work done at both the "growers' market" and at a "terminal market for distribution for consumption" and was clearly commercial under these decisions and under the decisions of the Appeals Council of the Social Security Administration in the cases of Edgar T. Penn (554-03-8307) and Marguerite K. Grimley (554-03-7972), decided July 15, 1947, and July 16, 1947, respectively.

I claim further that, except for any portion that was under \$45 during any quarter, the work clearly was brought under coverage of the Act by the express terms of Sect. 209 (b)(10)(A)(i), and am bringing this as a test case for all the employees of the California Prune & Apricot Growers Association and the Sun-Maid Raisin Growers of California, the only two dried fruit cooperatives in America, both of which fall within the categories

already ruled covered by the courts and the Social Security Administration.

Date: May 4, 1948.

/s/ MARY R. BAIOCCHI,
Claimant,
221 Cleaves Ave.,
San Jose, Calif.

/s/ ARTHUR L. JOHNSON,
202 Porter Bldg.,
San Jose, Calif.

Attorney for Applicant and the other wage earners
involved, and their dependents.

Acknowledgment of Request for Hearing

Your request for a hearing (of which the above is a copy) was filed on May 7th, 1948, at Room 1002 Commercial Bldg., 28 No. 1st St., San Jose, California. The referee will notify you of the time and place of the hearing at least 10 days prior to the date which will be set for the hearing.

For the Social Security Board,
By /s/ JOHN J. CASSIDY,
Manager,
San Jose, Calif.

To: Regional Referee.

[Stamped]: May 10, 1948. [9-B]

TRANSCRIPT OF HEARING

(Transcript of the hearing in the cases of Mary R. Baiocchi on her own behalf, and on behalf of Leola D. and Geraldine Baiocchi, for widow's current insurance benefits and child's insurance benefits, based upon the wage record of the deceased wage earner, Almando Baiocchi, social security account number 552-14-0672, whose claims were disallowed by the Bureau of Old-Age and Survivors Insurance of the Social Security Administration. Upon her request a hearing was held before Martin Tieburg, a referee of the Federal Security Agency, in San Jose, California, on May 26, 1948. The claimant was present and participated in the hearing. Representing the claimant was Mr. Arthur L. Johnson, and also testifying were Mr. Richard G. Wells, Personnel Director, California Prune and Apricot Growers Association; Mr. Gerald H. Hagar, Attorney, Hagar, Crosby & Crosby, Oakland, California, and Mr. T. O. Kluge, General Manager, California Prune and Apricot Growers Association.)

Opening Statement by the Referee

This is the hearing in the matter of Mary R. Baiocchi on her own behalf and on behalf of her two children, whose names are Leola D. Baiocchi and Geraldine Baiocchi, who filed for widow's insurance benefits and child's insurance benefits, being

appeals cases numbers 12-1093, 12-1094, and 12-1095.

Mrs. Baiocchi filed an application for the benefits referred to with the Bureau of Old-Age and Survivors Insurance of the Social Security Administration. The Bureau considered the application and came to the determination and did make the determination that the wage earner was not a fully insured individual. This determination was made on the basis that the earnings that he had received from the California Prune and Apricot Growers Association were in agricultural labor and, as such, were not wages, and without those earnings [10] on his wage record the wage earner did not have the number of quarters required to constitute him a fully insured individual.

Mrs. Baiocchi, on her own behalf, and on behalf of her two children, disagreed with the determination made by the Bureau and filed a request for a hearing before a referee of the Social Security Administration. Such a hearing is being held in San Jose, California, on May 26, 1948, before Martin Tieburg, referee for Region XII. Present at this hearing is Mrs. Baiocchi on her own behalf and on behalf of her children. Representing Mrs. Baiocchi on her own behalf and on behalf of her children is Mr. Arthur L. Johnson who has been duly authorized to appear as her attorney. Also present to testify is a witness from the California Prune and Apricot Growers Association, Mr. Richard G. Wells, personnel director of that associa-

tion. He is present, together with the attorney for the association—is your name Mr. Hagar?

Mr. Hagar: Yes.

The Referee: Mr. Gerald H. Hagar of Oakland, California. All these parties will testify and participate in this hearing when called upon to do so. In addition to those parties present is Mr. T. O. Kluge, general manager of the association, San Jose, California, and if called upon to do so will appear and participate in this hearing either at this time or at a continued or adjourned hearing.

Now, Mrs. Baiocchi and Mr. Johnson, I am going to read to you the remarks that are included upon the request for hearing which was executed by Mrs. Baiocchi on May 4, 1948, and ask you if that clearly and distinctly sets forth the contention that you make at this time on this appeal. The following is a reading of the request for hearing. (Reads.)

“I claim that my deceased husband’s work was not agricultural in any sense, that it comes squarely within the decisions of the U. S. District Courts in the cases of Bettencourt vs. Social Security Board, 66 Fed. Supp. 629, and Burger vs. Social Security Board, 66 Fed. Supp. 619, and of the U. S. Circuit Court of Appeals in the cases of Miller vs. Bettencourt, 161 F. 2d 995, and Miller vs. Burger, 161 F. 2d 992 (June 5, 1947) as work done at both the ‘growers’ market’ and at a ‘terminal market for distribution for consumption’ and was clearly commercial under these decisions and under the decisions of the Appeals Council of the Social Security

Administration in the cases of Edgar T. Penn (554-03-8307) and Marguerite K. Grimley (554-03-7972), decided July 15, 1947, and July 16, 1947, respectively.

“I claim further that, except for any portion that was under \$45 during any quarter, the work clearly was brought under coverage of the Act by the express terms of Sect. 209 (b)(10)(A)(i), and am bringing this as a test case for all the employees of the California Prune & Apricot Growers Association and the Sun-Maid Raisin Growers of California, the only two dried fruit cooperatives in America, both of which fall within the categories already ruled covered by the courts and the Social Security Administration.”

Mrs. Baiocchi, this is the request for hearing which you have supplemented and that is the contention you make; is that correct?

Mrs. Baiocchi: That's right.

The Referee: We will proceed at this time with the introduction of the various exhibits in this matter from the claim file.

Mr. Johnson: I wonder if I could interpose to state there that I represent the various unions involved in this and am appearing on behalf of all of these people who are interested in this problem. I would like the record to so show that I am appearing for the entire group of both this association and the Sun-Maid Raisin Growers of California, representing both A F of L and CIO unions, and independent employees and their dependents.

The Referee: For the purposes of the record, could you state for the record the exact name and title of these unions that are involved in this case.

Mr. Johnson: Well, here in San Jose it is the Warehouse Union, the CIO group; in Fresno it is—— [12]

The Referee: What local?

Mr. Johnson: Local 6. In Fresno it is the Dried Fruit Union, A F of L group; in Oakland it is the A F of L group; in Napa, the A F of L group; in Healdsburg it is the CIO group, a branch of the same Local 6. They are all looking to me to take this through as a test case because their workers that are employed by these two associations, co-operatives both of them, and the only two dried fruit coops in America, as I understand it, and they are looking to me to handle this matter.

The Referee: We will now proceed with the introduction of the exhibits in this matter.

Exhibit A. Application of Widow, and Widow on Behalf of Child, for Survivors Insurance Benefits, Signed by Mary R. Baiocchi, Dated July 18, 1945. (Document Nos. 1-2.)

Exhibit B. Photostatic Copy of Wage Record of A. Baiocchi as Maintained by Social Security Administration. (Document unnumbered.)

Exhibit C. Request for Reconsideration, Dated November 8, 1947. (Document No. 16.)

Exhibit D. Copy of Wage Record of Almando Baiocchi for Services Rendered California Prune and Apricot Growers Association, from February

1, 1941, to and including November 4, 1944. (Document Nos. 22-26.)

Exhibit E. Copy of Letter to Mrs. Mary R. Baiocchi from Social Security Administration, Dated March 26, 1948. (Document No. 31.)

Exhibit F. Report of Contact Between Albert L. Benelisha, Acting Manager, San Jose, California, Field Office, and Thomas Miller, Secretary, California Prune and Apricot Growers Association, San Jose, California, Dated April 28, 1948. (Document No. 34.)

Exhibit G. Letter to Social Security Administration from T. O. Kluge, General Manager, California Prune and Apricot Growers Association, San Jose, California, Dated April 29, 1948. (Document No. 35.)

That constitutes all of the exhibits in this matter.

MRS. MARY R. BAIOCCHI

the claimant, was duly sworn and testified as follows: [13]

Examination

By the Referee:

Q. Your name is Mary R. Baiocchi?

A. That's right.

Q. And you are the widow of Almando Baiocchi?

A. That's right.

Q. And you have two children whose names have been given, and they are the children of yourself and Mr. Baiocchi?

A. Yes.

Q. And they are both under 18 years of age?

(Testimony of Mrs. Mary R. Baiocchi.)

A. One is over 18 now but at the time of the application they were both under 18. Leola is over 18 now.

Q. What is your age? A. 45.

Q. So that at the present time you are filing application for what is known as a widow's current insurance benefit? A. Yes.

Q. At the time of your husband's death you were living together with him as husband and wife?

A. Yes.

Q. At the same address? A. Yes.

Q. And that was in San Jose? A. Yes.

Q. Is your present correct address 221 Cleaves Avenue, San Jose, California? A. Yes. [14]

Q. You know that your husband was at one time or another employed by the California Prune and Apricot Growers Association? A. Yes.

Q. Do you know anything about his employment other than the fact that he was employed there?

A. Well, I know he did all kinds of work there.

Q. But you don't know anything about the association itself, how it is managed, or anything about it? That is something that you would be satisfied to rely upon the testimony adduced from the other witnesses? A. I think so.

Q. And that is agreeable, is it not, Mr. Johnson? Mr. Johnson: Yes, it is, Mr. Referee.

Q. Do you have any facts that you think will be pertinent to the matters which will come before us that you want to testify to other than the facts

(Testimony of Mrs. Mary R. Baiocchi.)

that will be testified to by the officials and employees of the company who are familiar with its structure and its operations?

A. Well, the thing is that I don't see why they could call that agricultural where that is in the city limits, almost in the middle of the city limits.

Q. Well, that is something, of course, that is quite technical, and that is a fact to be considered and will be considered.

Mr. Johnson, do you know of anything Mrs. Baiocchi should testify to?

Mr. Johnson: Well, I have here a photograph of Plant No. 11 of the California Prune and Apricot Growers Association.

Q. Don't you think it is best that we reserve that until we take the testimony of the witnesses who will testify as to its operation. They will be [15] in a position to testify as to its location and everything about it.

Mr. Johnson: Yes.

I will ask if her deceased husband worked at plant No. 11 on Cinnabar Street?

Q. That is in San Jose?

Mr. Johnson: Yes.

Did he ever work at any other plant of the association?

A. No. He worked at Roberts but that is not in the association.

Q. Now in connection with the disposition of these matters, and while you are a witness before

(Testimony of Mrs. Mary R. Baiocchi.)

me it is proper that I ask you if you have any finding of fact that you propose I would make or, rather than that, is it satisfactory to you that that matter remain for the close of the hearing and that such proposal be made on your behalf by your attorney? A. I think so.

Mr. Johnson: That is satisfactory.

Could I ask if you have in your file, Mr. Referee, a breakdown of the earnings of Leola Baiocchi and Geraldine Baiocchi, and also those of Mrs. Mary Baiocchi subsequent to the death of the wage earner in this case. I think it would be material because in certain months more than \$15.00 was earned by some of these claimants in covered employment.

Q. Well, Mr. Johnson, do you have it in the form of a list, or could you prepare a list from the information furnished by your client that you could submit for the purpose of the record?

Mr. Johnson: I think there was one attached to the request for reconsideration. I assumed that would be made a part of the record so I didn't prepare an additional list. [16]

Q. I have that in the claim file. It does not give the employments and any other employment covered or noncovered which the parties may have engaged in, which is in itself a question. I might suggest that if you can prepare in the future a listing of all the various places they worked, what times they worked and what their earnings were—I have that of Mary Baiocchi from the Richmond-Chase Company.

(Testimony of Mrs. Mary R. Baiocchi.)

I might ask you, Mrs. Baiocchi, have you ever since your husband's death worked for any other concern other than the Richmond-Chase Company in San Jose, California?

A. Yes, I worked at Clapp's Baby Foods.

Q. Is that a cannery?

A. Cannery for baby food in Santa Clara.

Q. Do you have a listing of her earnings and the times they were received or could you obtain those?

Mr. Johnson: I don't have them except for the Richmond-Chase Company, but I imagine we could obtain those. That is during this year?

Q. Since the death of her husband.

Mr. Johnson: Your testimony is that your work with these two concerns that you last mentioned has all been in the year 1948; is that correct?

A. Well, the latter part of '47 and '48 now.

Mr. Johnson: How much of it was done in the latter part of '47? A. Just about 2 weeks.

Mr. Johnson: What month?

A. December.

Mr. Johnson: How much did you earn in those 2 weeks in December?

A. They were very small checks. [17]

Mr. Johnson: Over \$15.00?

A. Yes.

Q. What concern was that for?

A. Clapp's Baby Food.

Mr. Johnson: Have you been working in covered

(Testimony of Mrs. Mary R. Baiocchi.)

employment and earning over \$15.00 per month ever since the first of this year?

A. Just about. I made over \$15.00.

Mr. Johnson: So that this record then, Mr. Referee, would be complete as far as stating the facts on the basis of which a ruling might be made in that regard, as far as Mrs. Mary Baiocchi is concerned.

Q. What kind of work did you do for the Richmond-Chase Company?

A. Machine operator or cutter.

Q. What did they produce?

A. Canning fruit.

Q. It was a canning operation? A. Uhuh.

Q. You didn't engage in any packing operations of fresh fruits and vegetables? A. No.

Q. Then is it stipulated, that is, are you in a position to stipulate these earnings from Richmond-Chase were in covered employment?

Mr. Johnson: Correct.

Q. Now, insofar as the two children are concerned, the record here discloses that Leola Baiocchi was paid on July 18, 1945, \$70.47. What period did that cover? A. I think that was in '45. [18]

Q. I think it would require—possibly your recollection may not serve you that far back, but if you can investigate that a bit further and ascertain in what months she worked and what sums she received for the months rather than the pay dates, I would like to have that, Mr. Johnson.

(Testimony of Mrs. Mary R. Baiocchi.)

A. She was going to school at the time. She only worked in the summer time, July, August and September. It would be about the middle of September, that is about all.

Q. So that she performed no services in June of 1945 at all that you know of?

A. She was going to school at the time.

Q. Was that for the U. S. Produce Company?

A. That's right.

Q. What kind of a business is it?

A. Cannery. Fresh fruit.

Q. They can fresh fruit? A. Uhuh.

Q. There is no other fresh fruit packing other than canning operations?

A. That is all; I think so.

Q. Are you familiar with that concern, Mr. Johnson?

Mr. Johnson: That is in covered employment. It is so stipulated.

Q. Now in 1946 she again worked the same 3-months' period and received the sums shown on document 15 in this claim file. That was for the same concern? A. That's right.

Q. Now, as regards Geraldine Baiocchi, there are earnings shown here in August, 1947, and September, 1947, for the Hershel Company. What business are [19] they in?

A. In fresh fruit canning.

Q. You understand that to be covered?

A. Yes.

(Testimony of Mrs. Mary R. Baiocchi.)

Mr. Johnson: We so stipulate on that.

Q. Did they work at any other times since 1945 for any other concerns? A. No.

Q. In covered or noncovered employment, I mean. A. Not at all.

Q. At the present time is the one under 18 working? A. No, she goes to high school.

Q. Then it is not anticipated that she will again work until this summer when she is out of high school? She hasn't worked during Christmas vacations? A. No.

Mr. Johnson: Could I ask about the older one now over 18? Did she continue in school until she became 18?

A. No, she quit school. She got married.

Mr. Johnson: When?

A. In October.

Mr. Johnson: What year?

A. '47.

Mr. Johnson: In October of '47, was she then over 18?

A. Yes, she became 18 on March 20.

Q. of 1947? [20] A. Yes.

Q. She married thereafter?

A. Yes, she married in October of '47.

Mr. Johnson: So then she continued in school until she was 18?

A. No, I think she quit school to go to the cannery. She didn't go back to school.

Q. That was in the summer time?

(Testimony of Mrs. Mary R. Baiocchi.)

A. She didn't go back to school in September.

Q. She was over 18, wasn't she, in September?

A. Yes, that is right.

Mr. Johnson: Does that clear up that angle to your satisfaction so we don't have to submit anything further on that, Mr. Referee?

Q. (Remarks off the record.)

At this point in the hearing we will take into the record and mark as Exhibit H two documents in the claim file not heretofore introduced, which are documents 14 and 15, being a listing of earnings of the claimant and her two children for the periods to which she testified near the close of her testimony.

Introduced as Exhibit I is a copy of a letter from the California Prune and Apricot Growers Association, addressed to the Social Security Administration, dated October 22, 1947.

I have in my hand a letter from the California Prune and Apricot Growers Association, addressed to Mr. Arthur L. Johnson, dated May 25, 1948, relative to the number of employees employed by the association which will be taken into the record and admitted as Exhibit J.

At this time I have in my hand, submitted by Mr. Johnson and examined and discussed with Mr. Hagar, the attorney for the association, a prune marketing agreement which is the form of agreement entered into between the actual grower and a local cooperative association; is that correct?

Mr. Hagar: Yes, sir.

Q. This will be taken into the record and marked Exhibit K.

I also have a form of contract of the California Prune and Apricot Growers Association entitled "Local-Central Contract," which is introduced into the record and marked Exhibit L.

MR. RICHARD G. WELLS

was duly sworn and testified as follows:

Examination

By the Referee:

Q. Would you kindly state your full name and residence address for the purpose of the record, Mr. Wells?

A. Richard G. Wells, 435 South 14th Street, San Jose, California.

Q. You, Mr. Wells, are connected in some capacity with the California Prune and Apricot Growers Association; is that correct? A. Yes.

Q. Are you the personnel director for that association? A. Yes.

Q. And your office is in San Jose, California?

A. Yes.

Q. What is the address of that office?

A. San Antonio and Market Streets.

Q. How long have you been connected with this association, and, for the purposes of brevity and convenience, we will refer to it as "association" instead of using the entire name. [22]

A. 3 years and 8 months.

(Testimony of Richard G. Wells.)

Q. You are familiar with the operations of this company and its State-wide operations?

A. Yes.

Q. Does your work take you to the various points of the State at which the association operations are carried on? A. Yes.

Q. Are you familiar with their methods of acquisition of fruit and their handling and distribution? A. Reasonably so, yes.

Q. What exactly are your duties in the association? A. Well——

Q. I mean just a general description.

A. Labor negotiations, contract agreements, grievances with unions, personnel problems and relationships, plant job evaluation, scope, descriptions, and editorship of the association employee paper, conduct training programs for supervisory personnel.

Q. What do you have to do in your work which is related to the contract or other relationship between the association and its grower members, either through the local associations or with these growers individually.

A. During the past 13 months the association has been conducting an educational program with ten other California marketing cooperatives, which is known as a farm coop educational program. In that program we have visited various geographical areas in the State of California conducting sessions known as "Information Please" programs to Future Farmers of America chapters in which [23]

(Testimony of Richard G. Wells.)

the local associations have participated. By "local associations" I am referring to CP and AGA locals. We also have grower members who work in our plants as regular general laborers, and there are union contract stipulations in regard to the employment of said growers.

Q. Have you, in connection with this survey—let's call it a survey or an education program—made a study of the relationships between the association and the individual grower?

A. Yes, I have. It has been a requirement to answer some of the questions posed at the group by various Future Farmer students on the second school level.

Q. Where did you get your information to answer those questions relating to the relationship between the association and grower?

A. I had to review the by-laws and acts of incorporation of the association and various and sundry literature prepared for future prospective growers interested in becoming association members.

Q. Did you also at various times consult officer members of the association, such as Mr. Kluge possibly, and Mr. Miller?

A. I had to consult with Mr. T. Kluge, general manager; Mr. W. S. Rice, field manager, and Mr. J. D. Canton, superintendent of production, and many of our plant superintendents who are also field men associated with the Field Department.

Q. How many plants in which produce is ac-

(Testimony of Richard G. Wells.)

tually handled does the association operate in the State of California?

A. The association operates 18 active receiving, storage, grading and processing plants, one general shop, and the main office located in San Jose. [24]

Q. What is the general shop?

A. The general shop is a unit maintained by the association, staffed by journeyman mechanics for the research or building and repairing and general maintenance of the association equipment.

Q. None of the produce that is handled by the association is handled through that shop for commercial purposes? It is used only for research and experiment; is that correct?

A. That is correct.

Q. And of course none of the produce is actually handled other than the sample form in the offices; is that correct?

A. That would be correct.

Q. Do you have a selling organization in the association also?

A. The association maintains a sales staff.

Q. Separate and distinct from its cooperative features? By that question I mean is the sales staff separate from the staff that obtains the fruit and handles the fruit?

A. The association has departmental groups, a field department, and a manufacturing department, a general accounting department, and a sales department so it has equal standing in various similar organizations to the others I named.

(Testimony of Richard G. Wells.)

Q. Where does it maintain sales offices, if you know, the association?

A. May I at this time state if there is any correction or addition Mr. Hagar would like to add to my statements, is it permissible?

(Remarks off the record.)

Continue relatively. [25]

A. Traditionally the commercial food business has been handled by food growers which are located throughout the world.

Q. Does the association itself operate a sales office at any place other than its head office?

A. To the best of my knowledge there are two men on the staff paid directly by the association as a type of liaison sales promotion in the eastern part of the United States.

Q. They are merely promotional in that they call on prospective consumer organizations possibly and advertise the merchandise rather than are concerned strictly to taking orders for immediate shipments or direct shipments?

A. Well, from statements rendered I would say that if an order was offered to them they would get it down the correct channels.

Q. But they are not paid?

A. I think Mr. Hagar could answer that better than I.

Q. Mr. Hagar has a correction to make, being better versed in this, and his statements will be accepted in the record at this time in response to that question.

(Testimony of Richard G. Wells.)

Mr. Hagar: The association sells through independent brokers; it does not maintain any separate sales organization which sells directly to a sales grocery store or small consumer. It does sell directly to large chains, such as Safeway, but other than that exception or those exceptions it operates exclusively through independent food brokers.

Q. And I assume, Mr. Wells, from your knowledge you can state that those brokers are situated in various parts of the United States; is that correct? A. Yes, and the world. [26]

Q. And the world. Now it appears in the record in this case, and so that you know what I am directing my question at I will read that portion of the record to you. This appears in Exhibit F, and I will read a part of a paragraph thereof:

“Upon receiving a purchase order from such organizations as Safeway Stores, A & P Stores, Red & White Stores, etc., or from brokers, they process and pack the dried fruit in containers as per order * * *”

Do you know what percentage of the produce that is handled by the association is sold directly to these large concerns named and others who may not be named? The names are Safeway, A and P, Red and White Stores, and that may also include Hagstrom's; Lucky Stores, and others I might name.

A. I think I would be at liberty to make the general statement of between 40 to 45 per cent.

Q. That sold direct retail?

(Testimony of Richard G. Wells.)

A. Carton packed and sold directly to these large super markets and chains, as mentioned.

Q. And the other 55 per cent or so, I assume—I am not limiting you to 55 per cent, but it might be 60 per cent is sold through brokers? The carton pack; is that right?

A. Yes, we are referring to carton pack.

Q. Now, in addition to that, I assume there is what might be called bulk pack as compared to carton pack?

A. Yes, we prepare and handle a bulk pack.

Q. Well, for the purpose of the record, what kind of pack do you sell? You have indicated that you sell the carton pack. What other packs do you sell? [27]

A. Well, at the present time we are selling a carton pack in various sizes, and we also have a pliafilm pack, and then there is what is termed a boat pack which has a visible pliafilm or cellophane top.

Q. Those are all——

A. They are specialty packs.

Q. That is one class. That wouldn't be considered a carton pack?

A. No, those are referred to as specialty packs. The other is strictly a carton.

Q. I see. Is there any other type of packs, such as in large sacks or large cases?

A. Well, there are two general bulk packs. That is in fibre and shook, fibre being cardboard and shook being wood.

(Testimony of Richard G. Wells.)

Q. Does that substantially represent every manner in which the main portion of the produce is packed at the time of the shipment?

A. I would say that——

Mr. Hagar: If I could interrupt I would like to say that I am sure Mr. Kluge could give you specific details on anything with regard to the manufacturing.

Q. I see.

(Recess.)

Let the record show that Mr. Wells has been excused from the stand and Mr. T. O. Kluge, general manager of the association, is now present and he will take the witness stand and testify.

MR. T. O. KLUGE

was duly sworn and testified as follows:

Examination

By the Referee: [28]

Q. Your name is T. O. Kluge, K-l-u-g-e, is that correct? A. That is correct.

Q. You are the general manager of the California Prune and Apricot Growers Association?

A. Yes, sir.

Q. Would you kindly state your residence address, Mr. Kluge?

A. 1910 University Way, San Jose, California.

Q. And your office is at the head office of the association? A. That is correct.

Q. What is that address?

(Testimony of T. O. Kluge.)

A. Market and San Antonio Streets, San Jose, California.

Q. How long, Mr. Kluge, have you been connected with this association in any capacities?

A. Since 1928.

Q. How long have you been general manager?

A. About 2½ years.

Q. Before that 2½ years, what was your capacity?

A. Assistant general manager.

Q. How long were you assistant general manager?

A. From 1928 until the time I became general manager.

Q. (Remarks off the record.)

Mr. Kluge, can you give me a rough estimate or a rather authoritative estimate of what percentage of, for instance, prunes. Let's take the total percentages that are produced in California and put through regular distribution channels. What percentage of that total is handled by the association?

A. Approximately one-third; it will vary lower and higher than that percentage.

Q. It would be safe to say that over a period of several years the average will approximate one-third of total prune production?

A. I would say that is approximately correct.

Q. And the other two-thirds are handled by what types of concerns?

A. Well, what we term as commercial packers.

Q. Do you know the practice in California by

(Testimony of T. O. Kluge.)

these commercial handlers as to what portion of that two-thirds is packed by them as a result of outright purchases by them from the grower as compared to packs by them for a fee for the account of the grower? Is that question clear?

A. If I understand the question correctly you are asking what proportion the commercial handlers buy outright and what proportion they pack for a fee.

Q. In tonnage.

A. I would say, to the best of my knowledge, that over 95 per cent of the tonnage that is handled by commercial packers is outright purchases.

Q. And though that will vary from year to year or season to season that would be a pretty fair average for the period involved here, which is from approximately 1941 to the present date?

A. That is correct. Prior to that time there were contracts entered into with the Federal Surplus Commodity Corporation on a fee basis, but I think that my statement is substantially correct from 1941 to the present date.

Q. Is there any way that you could estimate how many other individual sizeable concerns there are that your organization competes with? Are there just a few or are there very many? [30]

A. I would say that the range—it will vary from season to season—but it is a minimum of 20 and probably a maximum of 35. You are speaking, I presume, of California?

(Testimony of T. O. Kluge.)

Q. California. A. That is right.

Q. Your concern does not handle the produce of any other State for distribution?

A. That is correct.

Q. Is the produce handled by you raised in every part of the State, or is your activity confined to a section of the State of California?

A. At the present time we are working or handling produce from as far north as Red Bluff to as far south as the Tehachapi, occasionally a smaller tonnage south of the Tehachapi.

Q. Now of that area alone, confining your answer to that area as far north as Red Bluff and as far south as the Tehachapi Mountains, would your previous answer as regards the ratio of the tonnage handled by you as compared to the tonnage handled by other commercial handlers be substantially the same?

A. I wouldn't say so on one particular commodity, and that is dried apricots. We receive a very small tonnage of dried apricots south of the Tehachapi Mountains.

Q. I see. Let me put the question more pointed. Confining ourselves to prunes alone, would you say that of all the prunes produced in, well, California, that the central area between Red Bluff and Tehachapi, that your association handles, packs and distributes about one-third of the production? [31]

A. That is approximately correct.

Q. Are prunes the largest commodity handled by your association? A. Yes, they are.

(Testimony of T. O. Kluge.)

Q. What is the next largest in volume and importance?

A. That will vary from season to season. Some years it is apricots, and other years it is peaches.

Q. And then those two commodities will be either second or third?

A. That is correct.

Q. What would be the fourth in importance?

A. In recent seasons I would say that nectarines would be fourth. Pardon me, there is one other commodity that will exceed nectarines, and that commodity is apricot pits.

Q. That is a by-product of the apricot?

A. That is a by-product.

Q. If you know, what is the percentage of prune pack produced in California to that produced in the rest of the United States? I might ask you this. Is it not a fact that California is one of the principal States in prune production?

A. It is the principal State.

Q. I see. Well, then, that being the fact, can you estimate what the relative importance is of the California food production to the production in the entire United States?

A. You are talking of prunes now?

Q. Prunes.

A. I would say that, giving the last 2 years as an example, California has produced over 200,000 tons of prunes, whereas the Northwest has produced less than 10,000 tons of dried prunes. [32]

(Testimony of T. O. Kluge.)

Q. Is there other production in the Middle West?

A. There is not, to my knowledge.

Q. So that we are now considering one commodity which is more or less local for our purposes?

A. Yeah, and to the best of my knowledge the production of prunes in the Northwest last year was less than 10,000 tons, whereas the California production was in excess of 200,000 tons.

Q. Now confining ourselves to the Pacific Coast production, or, let's just confine ourselves to California production in this region that you principally serve, from Red Bluff to Tehachapi, what is the ratio between the pack of dried prunes and dried peaches or apricots, whichever might be second in any period?

Mr. Hagar: Could I interject at this point? Are you talking about tonnage or dollars?

Q. Let's confine ourselves to tonnage so we will have a single standard to go by and there will be no confusion.

A. If I understand the question correctly you want to know the production of dried prunes in the area which I mentioned as compared to dried peaches, for example; is that correct?

Q. Yes, if that were the second commodity.

A. I would say that the production of dried prunes, as I stated previously, was over 200,000 tons as compared to approximately 16,000 tons of dried peaches from the 1947 crop.

(Testimony of T. O. Kluge.)

Q. I see. Anticipating your answers to your smaller packs, is it reasonable to assume that about 75 per cent at least of the operations of your association is in prunes? [33]

A. Based on 1947 production the association's operations will be in excess of 85 per cent on prunes as compared to the other commodities.

Q. To all the others combined? A. Yes.

Q. So that a determination here which would be on the question of prune production, handling and distribution would fairly represent the greater part of your business?

A. That is correct.

Q. I understand what has been submitted heretofore that probably the bulk, if not all, of the production that goes through the association is brought to the association by grower members. Now as against that does the association purchase or acquire any produce from nonmembers for handling, packing or packaging and sale?

A. We do not.

Q. In other words, so to speak, every pound of produce that comes in there comes in through the regular channels under the contract provisions that you entered into with the various locals?

A. That is correct.

Q. Now, as I understand the structure of this organization, it is divided into numerous locals, which locals have the direct personal contact with the individual grower?

A. Yes. (Answer indicated by nod of head.)

(Testimony of T. O. Kluge.)

Q. How many of these locals are there?

A. I think there are 28 at the present time.

Q. Would that indicate that each one of these locals has a plant of its own, a structure in which operations are carried on? [34]

A. Not necessarily.

Q. Then a local might be just an association of people?

A. That is correct.

Q. But your association does provide physical plants for the handling of this produce in various parts of the State?

A. That is correct.

Q. In how many different places do you have physical plants?

A. Approximately 16, is it, Dick?

Mr. Wells: 18.

A. Pardon me, 18.

Q. Do you have a principal point at which your packing is done? Could I ask this question. Is San Jose one of your principal points?

A. San Jose is one of the principal points.

Q. And in the San Jose area, which we will assume is confined to Santa Clara County, how many plants do you have?

A. 8.

Q. Do each of these physical plants handle all the various types of fruit that the others do or are some of them confined to particular types of fruit or classes of fruit?

A. Some are confined solely to prunes; some will handle solely cut fruits. By that I mean apri-

(Testimony of T. O. Kluge.)

cots, peaches, nectarines. Others will handle the combined items.

Q. Mr. Kluge, you are no doubt familiar with the processes of the firm known as Rosenberg Brothers, are you not?

A. Generally speaking, yes.

Q. Is there any difference in the actual operations in the plants operated by you as compared to the operations carried on in any Rosenberg [35] plant that handles prunes?

A. There is practically no difference in the physical operations.

Q. What do you do with the prunes? I understand that when the prunes are brought to you by the grower, either by truck or otherwise, and put on your receiving platform, from there on your employees handle the truck, the weight initially, and give a receipt for it, and thereafter it goes through certain processes. Can you just generally outline the normal process and various steps that that fruit goes through?

A. The general procedure is that the fruit is weighed, inspected for moisture content after the product has been prepared by the grower member, and then it is graded for any defects, sorted out, and then the fruit is placed in storage for later packing. That period may extend from 2 weeks to 18 months.

Q. May I interrupt you at this point. Do you have any plan of procedure whereby the fruit is

(Testimony of T. O. Kluge.)

so stored that the oldest stored fruit is packed next, or is it just taken out haphazardly?

A. At the time that the fruit comes in it is intermingled. By that I means all growers' fruit that may be received that day may be intermingled with other growers' fruit. We do not segregate each grower's fruit after it has been received and graded and a grade sheet issued on the particular delivery. As far as the time element is concerned, it does not follow that the first fruit that comes in is the first fruit that goes out. The procedure as far as processing, packing and shipment goes depends entirely on the orders that are received and the supply of each particular size or quality that we have at any given date. [36]

Q. At the time it is stored, after it has been graded and inspected, as you stated, am I correct in assuming that the fruit, the prunes (let's confine our answers to prunes for our purposes) are just dumped into a bin together with the same grade and quality?

A. That is correct.

Q. They stay there until they are actually taken out of that bin for packaging?

A. That is correct.

Q. Now we had asked Mr. Wells some questions regarding packaging and possibly you can clarify that. It was his estimate, and if he is correct so state, if not correct him,—it was his estimate, and it was merely a guess on his part, as he stated, that approximately 45 per cent of prunes that come into

(Testimony of T. O. Kluge.)

that plant go out of that plant in package or carton package form, if I understood his answer right. Is that substantially correct?

A. I would say that it would average around 40 per cent.

Q. He said 40 to 45 per cent. Now how is the balance packaged?

A. Generally in what we term "Bulk." I mean a box containing 25 to 30 pounds net. We do make occasionally shipments of prunes in bags.

Q. But you would confine it in two classes of packs, one is carton packed, and the other is bulk packed, or the carton may be a different size and the bulks may be a different size or shape.

A. That is correct.

Q. Now there is information in the file in this case that a large volume of fruit is sold directly by the association to retail distributors, such as Safeway, A and P, Red and White, and possibly others. Do you know whether or not the larger part of the fruit that is sold to these people is in carton pack or bulk pack? [37]

A. I would say from the 1947 product that by far the largest percentage was in carton or consumer packages.

Q. Now let's confine ourselves to cartons or, as you call them, carton or consumer packages,—we will just divide them into two classes for our purposes, carton and bulk. Of the carton pack what percentage of total sales is to retail distributors as compared to sales to brokers?

(Testimony of T. O. Kluge.)

A. I would say approximately 40 per cent of our sales of what you term "carton packs" go to concerns which we term chain stores, coop chains, super markets, who retail direct to the consumer.

Q. In other words, 40 per cent of your carton pack goes from your plants to a concern which is the only concern which will own and handle those prunes before they reach the hands of the ultimate consumer; is that right?

A. That is right. I would term that approximately 40 per cent of our domestic sales.

Q. Now, as regards your bulk pack, what percentage of your bulk pack is sold to concerns who in turn sell directly to consumer, and let's call those retail concerns.

A. I would have to make a guess on that.

Q. Your best guess.

A. I would say 75 per cent.

Q. In any event that proportion of the total bulk pack which is sold through brokers is by far the greater; is that it? You indicated 75 per cent.

A. I would say—through wholesalers?

Q. Wholesalers. A. Yes. [38]

Q. But they are sold to firms who in themselves will not contact the ultimate consumer until they take another step; is that it?

A. I would say, generally speaking, that is correct. There are some exceptions to it, of course.

Q. We must confine ourselves to generalities here, and there are only two classes so far as we are

(Testimony of T. O. Kluge.)

concerned. Possibly they could be broken down into 50, but it would serve very little purpose.

Now let's go to the question of the manner and methods that are used between the association and the actual grower in accounting and paying for produce delivered. Can you just talk on that rather than in response to questions and state in narrative form how that actually happens, giving the time lapses of everything.

A. Our growers manufacture the products that are delivered to this organization.

Q. May I stop you there. There is one important question. When the grower brings it to your plant is it already dried?

A. It is already dried, and that is what I meant by stating that the grower really manufactures the product.

Q. Do you do something else to it in the process of drying before the fruit is ultimately packed?

A. We do not. The fruit has to contain the proper moisture content before we will accept delivery on the product.

Q. I see. It must be in a form ready for packing at that time; is that correct?

A. That is correct, and also in a form that it will keep in storage because I previously stated that at times we may have to keep this fruit in [39] storage for a period of some 18 months.

Q. Do you clean the fruit at all?

A. We sterilize the fruit after it is removed from storage.

(Testimony of T. O. Kluge.)

Q. What is the sterilization process?

A. On prunes it is immersion in boiling water.

Q. Do you know what the process is in prunes in the drying process carried on by the grower besides laying in trays in the sun?

A. During the present period the fruit is largely dehydrated or dried by artificial means. The fruit is delivered by the producer to the dehydrator. The dehydrator will then in turn wash and what we term "dip" the fruit. Sometimes it is graded into two or three sizes, and then it goes into the drying chambers, and at the present time they are customarily called tunnels, and artificial heat is circulated over those prunes to dry them and bring them down to a proper moisture content. Then, after they are moved from the dehydrator, they go into storage for what we term a "curing process."

Q. It is all carried on by agencies other than your association?

A. That is correct.

Q. Your association does not render any such service but requires that that fruit go through processes such as that or that it will obtain the same result before it reaches your receiving platform?

A. That is correct.

Q. What portion of the fruit is at the present time being processed by dehydrators, commercial, private or otherwise, as compared with the old style, as I understand it, method of drying in the sun?

(Testimony of T. O. Kluge.)

A. My estimate would be in excess of 85 per cent.

Q. In this process of drying fruit are there any other agents, such as any kinds of powders or anything that are added to preserve the fruit? [40]

A. We will confine ourselves to prunes first, is that correct?

Q. Prunes, yes.

A. I would say in some dehydrators they may use a caustic solution at the time that they dip the fruit in order to cut or perforate the skin so that the fruit will dry more readily; some just use hot water for that purpose. It is customary to use a caustic solution in dipping prunes when they are sun dried.

Now there is an entirely different process for the drying of other fruits, such as apricots, peaches, pears, and nectarines.

Q. What do they use on apricots?

A. On apricots the apricots are generally taken into the cutting shed where they are cut and the pit is removed. Then they are placed on trays generally with the cut side up, and those trays are put into a sulphur house and then the fruit is subjected to sulphur fumes for a period from 6 to 12 hours on the commodities other than pears, and then they are placed in the sun in order to set the proper color. Then, after they are in the sun for that period, they are generally stacked dry.

On pears they are also cut and the calyx and

(Testimony of T. O. Kluge.)

stem removed. Generally, pears are sulphured from 24 to 56 hours, depending upon the commodity, the location and the climatic conditions.

Q. I think that gives us enough information on that phase of it. Now, as regards membership in this association, let's first put ourselves in the position of the locals. Do I understand correctly that the locals, these various local associations, each one independently incorporated or associated is made up of members confined strictly to growers?

A. That is correct. [41]

Q. There are no investors in that organization who have invested their money for profit other than the contributions of fruit and the dealings in fruit; is that correct?

A. That is correct.

Q. How is membership in each one of these individual associations evidenced?

A. Generally by a membership certificate which is issued by the locals after the applicant has signed the application, the marketing agreement, and that is passed on and approved by the local.

Q. You speak of an application. What is that?

(Remarks off the record.)

What is the substance of this application?

A. The substance of the application is the procedure for the local to approve the individual who has signed the marketing agreement.

Q. In other words, an individual signs an application which in substance and on its face asks that he be allowed to become a member of a par-

(Testimony of T. O. Kluge.)

ticular association, and after that application is taken to the association do I understand from what you said that it must take an act of the association and its members to allow him to become a member? A. That is correct.

Q. Now what is the membership of the California Prune and Apricot Growers Association? Who are the members of that?

A. 28 individual locals.

Q. And each one of those locals is a separate association? A. That is correct.

Q. So that indirectly each member of each one of these associations, through his local and building up the chain to your association, is a member [42] of your association? A. Yes.

Q. How many members are there? Not in precise figures, but generally.

A. I would say at the present time slightly under 5,000.

Q. Would you be able to give me an estimate of what acreage is represented by those 5,000 members? Is that a difficult question?

A. Do you want it confined to prunes?

Q. Let's confine it to acreage in prunes, yes. And then, while you are figuring that out with paper and pencil, you can anticipate my next question which will be: What is the ratio of that acreage to the prune acreage in the area served by your association?

A. I would say that we have approximately 46,000 acres of prunes in our organization.

(Testimony of T. O. Kluge.)

Q. What is the total acreage of prunes, including those 46,000 in the area served by your association? A. Approximately 135,000.

Q. Roughly you service approximately one-third of the tonnage and acreage of the service area in which you do business?

A. I stated previously that it will average about one-third on the 1947 production; it was slightly in excess of a third.

Q. Can you answer this question? What is the relation in tonnage volume your concern does annually in prunes as compared to the tonnage of your closest competitor? I understand I can ask you to give only an estimate. I doubt if anyone could know the exact figures.

A. Yes. It is possible that that figure may vary from season to season. I would estimate that our closest competitor would handle from 50 to 60 per cent of the prune tonnage that we normally handle.

Q. So that you—according to your answer it is your opinion that you are twice as large in tonnage as your next closest competitor or substantially almost twice as large as your next closest competitor; is that right? According to your answer of 50 to 60 per cent of tonnage that is handled by yourself?

A. Well, I would say as an average that we do not handle twice as much tonnage as our closest competitor.

Q. Well, I didn't mean to confine you to the exact double, but from your estimate of 50 to 60

(Testimony of T. O. Kluge.)

per cent—well, there is no reason in asking you this other question. That answers itself.

In your experience with this association, what is the average length or life of a contract a grower makes with your organization? Does it ordinarily last *ad infinitum* or does it result that growers have stayed with you a period of 3 or 4 years and then have been replaced by others?

A. We have some individual growers that have been with us since the inception of the organization. We have a vast turnover of membership, and that is due to transfers of property, deaths, and general withdrawals. You understand we have a withdrawal clause which entitles the producer member to withdraw from our organization from the 14th to the 28th of February in any year.

Q. But under your contract it is your understanding that if he does not withdraw during that 14-day period he is bound to deliver to the association all of his produce in the following seasons?

A. That is correct, the following season because he will have the same privilege the next year to withdraw.

Q. Oh, I see. I was assuming there was more than one season in a year. Can you indicate to me the percentage or ratio of growth of this [44] association from year to year? Has it been the experience of the association that it is from time to time acquiring a larger percentage of total growers or does it stay more or less stable?

(Testimony of T. O. Kluge.)

A. Well, I would say offhand, without looking up the figures, that our organization was more or less static for the period from 1929 to 1946, inclusive, and since that time we show a small growth.

Q. Well, I can't think of any additional questions that will throw much more light on it.

Mr. Johnson, do you know of any other line of factual evidence that should be adduced from Mr. Kluge?

Mr. Johnson: Well, Mr. Kluge, you mentioned that the products you received are manufactured before you receive them. Will you elucidate a little further on that and explain what you mean.

A. I would say by that I mean that the grower actually prepares the product after it is harvested or removed from the tree. Now we merely do a service in terms of processing and packaging after the product has been manufactured by the producer.

I might go a step further in that to state that the ultimate quality of the product depends upon the product that the grower produces. There is no known process to materially improve the product that is actually manufactured by the grower member, and it is true that nature has a hand in the production of this crop up to the time of harvesting, but after it is harvested the performance there is similar to the manufacture of lumber or other materials.

Mr. Johnson: In other words, nature produces the tree but man produces the lumber or manufactures the lumber from the tree.

(Testimony of T. O. Kluge.)

A. That is what I had reference to. [45]

Mr. Johnson: And you have drawn an analogy in the nature of producing the prune and the grower manufacturing that prune into the product that is turned in to you?

A. That is correct.

Mr. Johnson: And was there a time, say, when you and I went to high school together when they used to take that prune and these other products just as they were received from the grower and sell them in bulk in barrels in grocery stores?

A. Well, that is even true today to a limited extent. I can take you down a block from our office and show you prunes that are on the market that come in direct from the grower.

Mr. Johnson: And sold in bulk?

A. Yes.

Mr. Johnson: In barrels or sacks?

A. They happen to be sold in a box. They will be measured out in the quantity the consumer requests.

Mr. Johnson: And that formerly was the procedure, wasn't it?

A. I would say that practically all the prunes that were sold in this immediate area during the generation that you specified were received in a natural condition, and by that I mean furnished direct by the growers themselves.

Mr. Johnson: In other words, they were finished products at that time, manufactured into that state,

(Testimony of T. O. Kluge.)

and sold in that state. What do you do in addition, if anything, to that when you receive them in your plant as a matter of up-to-date practice? [46]

A. Well, the up-to-date practice is to grade them for quality and size and then sterilize the product and put them into consumer packages.

Mr. Johnson: Is that an absolutely necessary function?

A. It is not absolutely necessary, but it is a demand and trade custom at the present time.

Mr. Johnson: Formerly and before that demand and trade custom arose the grower found his market with the products just as they are received by you at the present time?

A. Oh, yes. I can give you further illustration on that. During the pre-Hitler days thousands of tons of prunes were shipped into Germany and other countries, such as Poland, direct from the grower's property or ranch to Germany and the other countries that I mentioned.

Mr. Johnson: Does the grower now find his market with your organization? Is that the grower's market in your opinion?

A. Oh, yes, that is our grower members' market. They look to us as their marketing outlet for the commodities that they produce. We, in turn, dispose of the crop and render an accounting to them at the end of the season.

Mr. Johnson: And do you consider yourself a marketing agency mainly?

(Testimony of T. O. Kluge.)

A. We consider ourselves as a coop marketing organization.

Mr. Johnson: You stated that payment is made to the growers. Is their payment made shortly after delivery to your plants?

A. Yes. We pay the grower after delivery to our plants what we term an "advance payment," and then progress payments are made periodically. Then after the crop has been disposed of we render a final accounting and remittance to the producer members. [47]

Mr. Johnson: And that advance payment is made ordinarily how long after the delivery of the product to your plants?

A. Immediately after it is processed through the plants and our accounting office.

Mr. Johnson: And ordinarily about how much does that advance payment amount to in percentage?

A. Generally speaking, approximately 65 per cent of the field price in effect at that time.

Mr. Johnson: Now the products that you receive, are they considered by the association as being the property of the association?

A. Yes, I would say so.

Mr. Johnson: Do you feel that the grower has parted with his economic interest in his particular crop?

A. Well, yes, because your fruit—pardon me. Probably I had better answer that in my own lan-

(Testimony of T. O. Kluge.)

guage. As L stated previously the crop is delivered by the grower member, it is commingled with other fruit, and we are empowered to borrow money on that fruit if necessary; as a matter of fact, during periods from 1934 to 1938 we even borrowed money on that fruit from Government agencies on the basis of pledge certificates that were issued as collateral. If my memory serves me right, nonrecourse loans were channeled through the Reconstruction Finance Corporation.

Mr. Johnson: At that time the Government agency considered your association as the legal owner of those crops?

A. They did to the extent that they accepted our pledge certificates as sufficient evidence of ownership, and those pledge certificates were hypothecated; as a matter of fact, in that particular period not only growers [48] of our organization but nonmember producers of prunes participated in the funds that were allocated by the Government to the extent that they borrowed the money and, under the nonrecourse provision, the Government eventually owned the prunes.

Mr. Johnson: And do you at the present time borrow on those products that you have stored in your warehouses?

A. We do not find it necessary to do that at the present time although we are empowered to issue warehouse receipts if necessary and hypothecate those with banks for borrowing purposes.

(Testimony of T. O. Kluge.)

Mr. Johnson: Do you borrow from banks on the basis of the credit that you have as a result of having these products stored in your markets?

A. We borrow substantial sums from banks without any collateral, due to the fact that the title is vested in the California Prune and Apricot Growers Association.

Mr. Johnson: And these contracts that you use are the same for peaches and pears and apricots and nectarines as they are for prunes except that you just change the word?

A. I would say that is substantially correct.

Mr. Johnson: And they provide that title passes as soon as the product is delivered to your plant and that it is then commingled according to your contract?

A. That is correct.

Mr. Johnson: And that you are thereby empowered to borrow money on those products under the terms of this agreement?

A. That has been done and we still have the power to do that under the terms of the various agreements.

Mr. Johnson: In other words, you consider that they are your products, belonging to the association? [49]

A. The California Prune and Apricot Growers Association.

Mr. Johnson: Supposing there would be a fire and the grower's crop would burn as soon as he

(Testimony of T. O. Kluge.)

delivered it to the association. Would you consider that grower still owned that crop and would you charge him for the loss of the crop?

(Remarks off the record.)

We experienced a substantial fire loss during 1946. It is our responsibility to cover the products delivered by the individual members with insurance, so, consequently, there would be no loss on individual producers in case of fire or other catastrophies that may occur.

Mr. Johnson: Where did this particular fire occur?

A. Pardon me, may I continue on that? As long as the loss was more or less nominal and would not necessitate charging against the membership as a whole.

Mr. Johnson: Did you have a substantial fire?

A. We had a substantial fire which I mentioned was at Chico, California, in which the loss was in the neighborhood of \$644,000.

Mr. Johnson: Did the growers whose crops were destroyed have to stand that loss themselves?

A. No, they did not. No individual grower would have had to stand any loss. If there had been a monetary loss to the association it would have resulted in a lower return on the entire crop delivery at that time. It so happened that there was no monetary loss at this particular fire.

Q. May I interpose a question at that point. Let's take a situation such as actually did occur

(Testimony of T. O. Kluge.)

which was in Chico where there was a partial loss of a crop or stored crop. Let's say it was 50 per cent. It so happened, and [50] probably does, that the only crop is prunes—let's assume they were all prunes stored in there that had come from only one of these local associations. Would the loss be amortized against the association as a whole? Would the loss be amortized against just the members of that independent association or would it be amortized against the members of all the independent associations?

A. Against all of them.

Q. That clears up that point.

Mr. Johnson: Yes. And if the grower had a fire loss immediately before he delivered or contemplated delivering to your plant or, say, the truck turned over at the gate of the plant whose loss would that be? The association's or the individual grower?

A. If it occurred prior to the time his truck entered our property it would be the individual's loss. I think we would have to confer with legal counsel as to whether or not there would be any responsibility on the part of the California Prune and Apricot Growers Association if the loss occurred after it entered our property.

Mr. Johnson: In other words, the grower is the owner of his crop until the minute he delivers it to your plant and gets a door receipt. Is that what you call the receipt given to him? A door receipt?

(Testimony of T. O. Kluge.)

A. That is correct.

Mr. Johnson: And from that time on you consider as marketed his crop and you are the market agency from then on?

A. That is correct.

Mr. Johnson: And he has parted with his economic interest in that crop and is entitled to an interest in the pool only; is that right? [51]

A. Well, that is a pretty broad statement. I may answer it to this effect. He has parted with the commodity; he still has an interest in the accounting in money.

Mr. Johnson: Well, is that any different from a grower delivering to, say, Rosenberg's or the California Packing Corporation?

A. Oh, no, I wouldn't say so.

Mr. Johnson: Is it exactly the same situation?

A. To the extent that our contract applies. I am not indicating here that our procedure, as far as cooperative marketing is concerned, is identical with the commercial packer, but I would say, as far as title of the commodity is concerned, the minute the fruit is delivered it is similar to a delivery made to a commercial operator.

Mr. Johnson: And in both instances, with the commercial operator and with your association, all the grower has is the right to an accounting in money?

A. That is correct.

Mr. Johnson: Now could you tell us anything

(Testimony of T. O. Kluge.)

about the labor turnover at your plants, Mr. Kluge? Mr. Wells has a letter that has been introduced in evidence indicating that employment records show a low of 334 employees and a peak of 1,574 people employed by the association. Does that represent all of the people that are employed there regularly, or is there a large labor turnover?

A. During and since the last war there has been a large labor turnover.

Mr. Johnson: What would you say the percentage is? [52]

A. I would say that during certain periods it may be as high as 100 per cent.

Mr. Johnson: Is that your estimate also, Mr. Wells? You are the personnel director.

Mr. Wells: Yes, it is, Mr. Johnson, during the seasonal parts of the year we are in operation.

Mr. Johnson: Had you figured your labor turnover for last year or do you have any more definite figure you can give us?

Mr. Wells: Yes. In 1947, the labor turnover for the 12 calendar months, January through December, was 102.6 per cent.

Mr. Johnson: Could I continue there with Mr. Wells, Mr. Referee?

(Remarks off the record.)

Mr. Johnson: Mr. Kluge, do a great number of your employees work for these commercial competitive concerns?

A. They have especially and they do especially

(Testimony of T. O. Kluge.)

since we have had union agreements in effect in our plants.

Mr. Johnson: Is it customary for them to go, for instance, from canneries when the canning season is over to your plant, and vice versa?

A. Oh, yes, that happens repeatedly. By the same token, we may have an employee or a number of employees working for us for a certain period, next week he may be working for Rosenberg Brothers, and could go the following week to the Cal-Pac or Richmond-Chase, and then he may come back to our plant for a short period.

Q. Mr. Johnson, again I say I don't want to foreclose you from any particular line of questioning that might be pertinent, but can't we, let's say, take judicial notice of the fact that it is known in this packing industry in all regions, or in most regions, let's say, and especially this [53] one, that the labor is quite itinerant and works in the same industry that goes from plant to plant, and we recognize that fact that one laborer may work one day doing the same work for one employer in a covered industry, and, as the matter stands today, comes to this organization and works in what is construed to be noncovered and performs the same duties under the same working conditions, for the same money, and under the same labor contract, let's say. Wouldn't that suffice for the purpose of the record?

Mr. Johnson: Yes, I imagine it would, if you take judicial notice of that fact that there is a

(Testimony of T. O. Kluge.)

large turnover, and right now with the others all ruled under coverage that there would be an injustice worked on these employees.

Q. That would follow as a legal argument.

Mr. Johnson: Yes.

Could I ask about apricots and peaches, for instance. What would happen to them if they weren't sulphured, if they were allowed to stand for any time after they were picked?

A. They would have a tendency to immediately darken.

Mr. Johnson: Would they turn real black after a period of time?

A. They would after a short period of time and they wouldn't be acceptable to the trade and consumer.

Mr. Johnson: So that in all cases where they are brought to your association they have been sulphured and processed?

A. Oh, yes. As a matter of fact, we even go so far as to take the sulphur content of the fruit at the time it is delivered so that we will know which fruit to process and pack on particular orders that we may receive. [54]

Mr. Johnson: And have you right along considered that your association is engaged in commercial work?

A. As to its physical operations, yes.

Mr. Johnson: And have you always considered that you were under coverage of the Social Security

(Testimony of T. O. Kluge.)

Act, and paid the social security tax and deducted for the employees?

A. We have, and I think we have gone on record to that effect.

Mr. Johnson: And you have also paid the State unemployment compensation tax, right along?

A. We do.

Mr. Johnson: And are under that coverage?

A. Yes.

Mr. Johnson: The law has not been changed, it has always covered the employees of your plant ever since the inception of the Social Security Act?

A. That is right, yes. I might state that we also deduct the withholding taxes on our employees.

Mr. Johnson: And have you been acting under legal advice in deducting the 1 per cent social security tax right along?

A. Naturally we have, especially when we were requested to discontinue that practice, and a decision was reaffirmed by our attorneys to continue the deductions.

Mr. Johnson: I think that is all.

Q. Before you arrived, Mr. Kluge, we asked Mr. Wells some questions relative to the constitution and by-laws of this organization, and Mr. Hagar has offered to submit and offer for the purpose of the record at least one mimeographed copy of the constitution and by-laws. You are familiar with them? [55]

A. Generally speaking, yes.

(Testimony of T. O. Kluge.)

Q. You would be in a position, when it is submitted to me by mail, to certify that to the best of your knowledge it is a true copy of the original constitution and a true copy of the by-laws?

A. I would be glad to, or, if you prefer, we will have the secretary of the organization certify it to that effect.

Q. Do each of these locals have their own constitution and by-laws? A. Yes, they do.

Q. Are they a standard form of constitution and by-laws, or are they each different from each other?

A. There are numerous provisions that are not exactly alike in the by-laws, but I would say that they are substantially correct. The differences may be as to the methods of holding annual meetings, elections, amendments to the by-laws, etc.

Q. Would it be possible to make available for the purpose of this record one set of constitutions and by-laws of one of these local organizations which would be typical, generally speaking, disregarding small technical matters, but on large, general matters which point to the relationship between this local association and each of its members which would be typical of all the others?

A. We will be glad to furnish you with a copy.

Q. Very well, Mr. Hagar, go ahead. Do you have some questions?

Mr. Hagar: Mr. Kluge, to whom was this \$644,000 loss paid by the insurance company?

A. To the California Prune and Apricot Growers Association. [56]

(Testimony of T. O. Kluge.)

Mr. Hagar: Does the California Prune and Apricot Growers Association carry insurance on the fruit after it is delivered to them?

A. It does.

Mr. Hagar: Do you know whether or not the individual grower or the individual local carries insurance?

A. They do not carry any insurance after the commodity is delivered to the California Prune and Apricot Growers Association.

Mr. Hagar: You spoke of approximately 85 per cent of the prunes being dehydrated. Do most growers own their own dehydrators?

A. I would say not. That is based on my own individual estimate, of course.

Mr. Hagar: And these dehydrators that are not owned by the individual growers are not located on the farm of any particular member; is that correct?

A. Will you ask that question again, please.

Mr. Hagar: Where the grower member does not own his own dehydrator the dehydrator is not located on the farm of a member?

A. No, it is not.

Mr. Hagar: In what condition are the prunes delivered to the dehydrator by the grower?

A. In what is termed as a fresh state.

Mr. Hagar: By that you mean what?

A. Prunes immediately after they are picked, and before they are dried or manufactured.

Mr. Hagar: With regard to the various plants of the association, take your plants here in San Jose,

(Testimony of T. O. Kluge.)

—do you ship in interstate commerce to [57] various parts directly in the United States?

A. We do.

Mr. Hagar: Do you ship directly from those plants to various parts in the world?

A. We do.

Mr. Hagar: That is all.

Q. Mr. Johnson, do you have any questions?

Mr. Johnson: Mr. Kluge, I would like to show you a picture of the plant and see if you recognize it as plant No. 11 of your association.

A. That is plant 11, located on Cinnabra Street in San Jose.

Mr. Johnson: That is within the city limits of San Jose, is it?

A. Yes, it is.

Mr. Johnson: I will show you this map of the city limits of San Jose depicted in green and ask you if this is somewhere near the center of the city limits of San Jose as shown by this map. (Shows map to witness.)

A. Oh, generally speaking, yes.

Q. Are you offering this picture as an exhibit? This picture will be taken into evidence, and without offering the map into evidence from the testimony given I understand this is a plant which is not adjacent to any land upon which fruit is grown. Is that the point?

Mr. Johnson: Yes, that is the point. Does the association own any land upon which fruit is grown?

A. We do not.

(Testimony of T. O. Kluge.)

Mr. Johnson: Do they lease any such land?

A. We do not.

Mr. Johnson: This not being adjacent to any such land, is it adjacent to a railroad? [58]

A. It is on the main line of the Southern Pacific Railroad in San Jose. There are also facilities for truck movement to various localities in California and interstate, and also the plant is available for local firms to pick up fruit for distribution to consumers.

Mr. Johnson: This railroad that is depicted in this picture as adjacent to this plant, is that a transcontinental railroad?

A. It is.

Mr. Johnson: This siding on which these cars appear, some seven or eight cars or more in this picture, is that a siding connected with that railroad?

A. Yes, and it serves our plant No. 11.

Q. You are referring to Exhibit M?

Mr. Johnson: Yes. And those cars are inside of this wire fence, I noticed.

A. Yes.

Mr. Johnson: Is the wire fence the boundary of your property?

A. Not all of it. Some of that property within the wire fence is leased from the railroad company.

Mr. Johnson: But the cars run right up to your plant and the products are unloaded from the platform of your plant right into these cars?

A. Yes. We have different arrangements at

(Testimony of T. O. Kluge.)

various of our plants with respect to the ownership of the property on which these tracks are located. Some of the property is leased from the railroad company, and other properties are owned by the California Prune and Apricot Growers Association.

Mr. Johnson: And I notice this truck there at a loading platform of your plant. Is that the usual road where such trucks are loaded? [59]

A. That is one of the loading platforms for shipment to various points or ports in California. We also have another loading or shipping platform for serving trucks for the same purpose.

Mr. Johnson: And do you also ship by boat to foreign countries?

A. We do.

Mr. Johnson: And in the different plants that you have the conditions are somewhat similar so that you would be shipping there to all parts of the world from each of your plants?

A. That is true.

Mr. Johnson: Would you consider each of your plants a terminal market for connection for consumption?

A. We do.

Mr. Johnson: I have three extra copies of this photograph if you need it, Mr. Referee.

I have one other question. In your letter of April 29, 1948, which is in evidence, you state that the association had not applied for or been granted an exemption under section 101(1) of the Internal

(Testimony of T. O. Kluge.)

Revenue Code. Do you feel that you would have any ground for asking for such exemption?

A. Not to my recollection, we would not come under the exemption provisions of that section.

Mr. Johnson: I think that is all.

Q. Do you have some letters that you wish to introduce at this time? Some rulings?

Mr. Johnson: Yes. I would like to ask Mr. Hagar a few questions first. Could I have him sworn? [60]

Q. I have just been wondering if that would be entirely proper since your questions would probably be asking his opinion of what the interpretation of this law is. It is my duty and the duty of the courts to pass upon this. I don't know whether it would be pertinent. (Further remarks off the record.)

Mr. Johnson: Could you make a brief statement as to your opinion as to the coverage of this act?

Mr. Hagar: Yes.

I have been the attorney for the California Prune and Apricot Growers Association, and I originally advised the association that the employees would come under the Social Security Act. My opinion was asked subsequent to that time, at the time the rulings came out and I advised them for a second time that they were subject to the Act. I felt that it was the clear intent of Congress that they should be covered by reason of the fact that the association, in my opinion, was engaged in manufacturing activities; that the fruit, after delivery to it, came

to rest in its warehouse and was kept there at times for many months and sometimes well over a year; that in connection with future crop years, particularly with regard to prunes, it was always the question of how much the carry-over from the preceding crop was which would indicate there are times when there is a problem in that the fruit of one crop year would be carried over until an additional crop year; that these plants were located on transcontinental railroads, the shipments were made to all parts of the world; that under that North Whittier Citrus Association case, if I remember correctly, that the association was not engaged in agricultural work but was engaged in the manufacturing and sales of the particular commodity that in my opinion, under the terms of the contract, the title had passed and therefore the grower member had no more interest in the fruit [61] except an interest in the proceeds; that the contract requires that the fruit (and I am quoting from the contract) "be delivered in merchantable condition." Therefore, if it is delivered in merchantable condition whatever work that the association did subsequent to that time would of necessity have to relate to manufacturing; that the types of merchandising had very materially changed in the last 20 years, where the fruit was originally prepared on the farm now the condition was changed so that the work that the association did in connection with the processing of the fruit was changed, and with it the manufacturing as distinguished from agricultural; that the plants of the association were not located adjacent

to any farm or had any contiguous property to a farm.

With those reasons, in general, I felt, although I probably could find a memorandum with considerably more reasons—at any rate I originally advised the association and have continued to advise the association, and still am of the opinion that the employees are covered, particularly where the employee of the association does the same identical work for a commercial handler, handling exactly the same type of product, prunes, and in one case is covered without any question by reason of the two recent decisions; in my opinion, where he performs this work for the association he is covered.

Question has been asked as to the exemption of the association. It is exempt, under the Internal Revenue Code, section 101(1)(12) from paying any income tax or filing returns, and originally so received a ruling from the Treasury Department, and on several times subsequent to that original ruling which was many years ago the Treasury Department has reaffirmed that ruling. I do not think that it would be exempt under section 101 of the Internal Revenue Code—101(1) for the purpose of the record.

Q. Mr. Johnson, is that the statement you wanted him to make? [62]

Mr. Johnson: You had anticipated the decision of the higher courts in the Burger and Bettencourt cases and so ruled years ago in 1939 or '40?

Mr. Hagar: Well, I don't know that "anticipated" is the correct word, but I was strongly of

the opinion, and still am, that they are and that those decisions were correct and coincided with my original ideas.

Mr. Johnson: How long have you been an attorney for the association?

Mr. Hagar: Since 1936.

Mr. Johnson: I wanted to ask Mr. Kluge if he could show any essential difference between the marketing of dried fruit and the marketing of fresh fruit with reference to the time element.

Mr. Kluge: Well, fresh fruit has to be marketed immediately or as fast as it can get to market. Dried fruit is not a perishable commodity and can be kept in storage for a number of months, whereas fresh fruit cannot.

Mr. Johnson: Do you know anything about the practice of marketing fresh fruit? Isn't it consigned to different shippers in the east and re-routed on occasions? Isn't there a difference between your practice and the way the fresh fruit packers handle it?

Mr. Kluge: From my limited knowledge, fresh fruit is generally started east and then diverted to the market which will afford the best price or has the lowest volume of the particular variety of fruit on hand at that time, and occasionally they are sold at auction. That is just my offhand knowledge of the fresh fruit business. As far as the dried fruit business is concerned, invariably the distinction is known, the buyer is known, and the price is known before the shipment is made.

Mr. Johnson: And when you sell through bro-

kers do you deliver to the brokers or do you deliver to the retailers that the broker represents?

Mr. Kluge: We do not customarily deliver or sell to brokers. The broker acts as the agent of the buyer and seller, and the fruit is shipped directly either to the wholesaler or shipped directly to the chain super-market or other forms of retailer, the distinction being that we sell to chain or large organizations for retail purposes, but do not sell to a corner independent retail store.

Mr. Johnson: I think that covers the situation, Mr. Referee.

Q. Do you have some letters you wanted to submit for the record at this time?

Mr. Johnson: Yes, I did. First of all, I wanted to submit copies of the previous rulings of the Internal Revenue Department. (Hands papers to referee.)

Q. Exhibit N will be a mimeographed copy of the Treasury Department Collector's No. 6219, dated December 31, 1947.

Taken into the record as Exhibit O will be a copy of the Treasury Department mimeographed Collector's No. 6239, dated March 1, 1948.

Taken in as Exhibit P is a Federal ruling under Internal Revenue Code designated as 487-SST-405 (copy).

Taken in as Exhibit Q is a copy of a ruling 8-SST-10.

Exhibit R is a decision and notice of decision of the Appeals Council in Case No. 12-139, being the Penn case.

Taken into the record as Exhibit S is a decision and notice of decision in the case No. 12-92 of the Appeals Council, being the Grimley case.

Exhibit T is a copy of the decision and notice of decision in Case No. 12-92, the Grimley case.

Can I assume, Mr. Johnson, that on behalf of your client you would propose that I make a finding that the services performed by the [64] deceased wage earner since 1939 for the California Prune and Apricot Growers Association was not in agricultural labor?

Mr. Johnson: That is correct.

Q. And that as a result thereof the credits for earnings he received from such employment constitute him a fully insured individual, and his surviving widow and their two minor children, for the period of their minority, are entitled to benefits subject to deductions for employment which they engaged in?

Mr. Johnson: Yes.

We have read the foregoing transcript and certify that it is a true and complete record of the hearing.

Date: June 3, 1948.

/s/ MARTIN TIEBURG,
Referee.

/s/ MIRIAM GARNER,
Hearing Reporter. [65]

REOPENING OF RECORD

In the Case of Mary R. Baiocchi (Claimant), Case No. 12-1093. Claim for Widow's Current Insurance Benefits.

In the Case of Mary R. Baiocchi on Behalf of Leola D. Baiocchi (Claimant), Case No. 12-1094. Claim for Child's Insurance Benefits.

In the Case of Mary R. Baiocchi on Behalf of Geraldine Baiocchi (Claimant), Case No. 12-1095. Claim for Child's Insurance Benefits.

In the Case of Almando Baiocchi (Wage Earner).

Social Security Account No. 552-14-0672.

The record in the above-captioned matter is this day reopened and there are hereby introduced thereunto by order of the referee the following exhibits:

U—Copy of Articles of Incorporation and By-Laws of the California Prune and Apricot Growers Association —

V—Copy of Articles of Incorporation and By-Laws of the Glenn County Prune and Apricot Growers, Inc. —

The above matter is now closed and hereby submitted for decision.

Date: June 8, 1948.

/s/ MARTIN TIEBURG,
Referee. [66]

EXHIBIT C

Federal Security Agency
Social Security Board

Request for Reconsideration

In the Case of Mary P. Baiocchi (552-14-0672 E)
(Claimant); Almando Baiocchi (Wage earner),
Social Security account number 552-14-0672.
Claim for Widow's benefits and support for
two minor children under 18.

To the Social Security Board:

I disagree with the determination made on the
above claim, and therefore request a reconsidera-
tion by the Bureau of Old-Age and Survivors In-
surance.

Remarks: (If you wish you may use this space
for statement of reason for disagreement.)

I filed claim on July 18, 1945, on behalf of my-
self and two minor children under 18, Leola D.
Baiocchi (552-14-0672-C2) and Geraldine Baiocchi
(552-14-0672 C1). Adjustment of my claim was
held up pending the determination of the Federal
courts in the Bettencourt and Burger cases. Now
that these cases have been finally decided in favor
of coverage for the dried fruit packing house work-
ers, I feel that my benefits, and those of my two
minor children, should now be awarded, just as
benefits were awarded by the Appeal Council to
Edgar T. Penn (554-03-8307A) and Marguerite K.
Grimley (554-03-7972), who worked for the same

concern that my deceased husband did—the California Prune and Apricot Growers Association, a commercial cooperative engaged in the packing of dried fruits in a terminal market for distribution for consumption.

I therefore respectfully ask that the benefits due me and my children be recomputed in the light of the court decisions in the Bettencourt and Burger cases and the court mandates issued therein ordering the Social Security Administration to consider workers engaged in this entire dried fruit industry as covered employees and entitled to the benefits of the Social Security Act.

I attach lists showing earnings of my children and myself since filing claim.

Date: November 8, 1947.

/s/ MARY BAIOCCHI,

Claimant.

221 Cleaves Ave.,

San Jose, Calif.

/s/ ARTHUR L. JOHNSON,

Authorized Attorney,

202 Porter Bldg.,

San Jose, Calif. 72]

EXHIBIT E

Federal Security Agency
Social Security Board
Washington

552-14-0672-E

14:AO:C2

March 26, 1948

Mrs. Mary R. Baiocchi
221 Cleaves Avenue
San Jose, California

Dear Mrs. Baiocchi:

This letter refers to your claim under Title II of the Social Security Act on your own behalf and on behalf of Leola D. and Geraldine Baiocchi based on the wages of Almando Baiocchi. The action on this case is also in reply to your request for a reconsideration.

Under the Social Security Act, no lump-sum or monthly benefits are payable unless the wage earner was fully or currently insured at the time of his death. To meet these requirements, the wage earner must have been paid wages of at least \$50 in employment covered by the Social Security Act in each of 17 calendar quarters beginning January 1, 1937, or he must have been paid wages of \$50 or more in covered employment for each of not less than 6 of the 12 calendar quarters immediately preceding the quarter in which he died.

Our records show that neither of these requirements has been met; therefore, no payment may be made based on the wages of the deceased.

Pay received from the California Prune and Apricot Growers Association after 1940 except for five calendar quarters could not be included because the work was agricultural labor.

If you disagree with this determination you may request that a hearing be held on your claim by a referee of the Social Security Administration. A request for a hearing should be made promptly and not later than three months from this date. If you desire a hearing, you should call at or write to the field office at Room 1003, 28 North First Street, San Jose 14, California, for assistance.

Very truly yours,

JOSEPH C. COLUMBUS,

Chief, Area Office.

Case No. 12-1093,

12-1094,

12-1095. [78]

EXHIBIT F

Federal Security Agency

Social Security Board

Bureau of Old-Age and Survivors Insurance

REPORT OF CONTACT

Office: San Jose, Calif.

Date: 4/28/48.

Account No. 552-14-0672.

(This form must be filled out in ink or on typewriter, as it becomes a permanent record.)

Name: Almando Baiocchi (Employee about whom contact is made).

Person contacted: Thomas Miller (To whom information is given or from whom received).

Contact made by telephone (In person or by telephone).

Address: Deceased.

Secretary, Calif. Prune and Apricot Growers Assn., San Jose, Calif.

Place of contact: San Jose, Calif.

Give brief statement of information requested and given:

In order to obtain additional information as to the nature of the Calif. Prune and Apricot Growers Assn., a telephone call was made to Mr. Miller, Secretary of the Association. In addition to information already contained in the file, the following was obtained:

The Association received prunes, apricots, peaches, pears, nectarines, etc., in a dried state (they handle no fresh fruit) from the growers in lots of tons or portions of a ton. They give the grower a door receipt—after which the dried fruit is graded and placed in bins with fruit of a like quality and size from other growers. The grower is then mailed a grade receipt and the fruit has lost its identity.

The plants act as warehouses and the dried fruit remains in the bins until a purchase order is received. They usually start packing, processing, etc., soon after the dried fruit begins to come in

from the grower, but no processing or packing is done until a purchase order is received, some of the dried fruit remains in the bins for a year or more, with sometimes a carryover to the next year—but probably never remaining in the bins as long as two years.

Upon receiving a purchase order from such organizations as Safeway Stores, A & P Stores, Red & White Stores, etc., or from brokers, they process and pack the dried fruit in containers as per order—one or two and as high as eleven pound paper cartons and up to twenty-five pound wooden boxes. The cartons or boxes are labeled in accordance with the purchasers wishes. However, over 50% are actually packed and sold under their own label. Others packed in packages labelled as the purchaser wishes.

Growers are paid for the fruit according to plan as income is received by the association.

The association is of the belief that their plants are terminal markets and differ materially from fresh fruit and fresh vegetable packing plants. Fresh fruit and fresh vegetable packers pack their produce, which to begin with are in their natural state, and ship to agents in eastern markets who act for any number of other shippers or packers. The produce is then bid for by many wholesalers and even retailers. In other words the packer and/or shipper does not consign produce to particular buyers upon order but ships to an agent

who may or may not be able to dispose of the produce depending upon the demand.

The association's produce is received from the grower in an unnatural state (it having been dried by the grower at the orchard) and then stored in bins until ordered by a particular firm which directs the association to pack the dried fruit in a certain type of container and in certain pound packages.

A. L. B.

Contact made by

/s/ ALBERT L. BENELISHA,

Acting Manager.

San Jose, Calif. [79]

[Stamped]: Bureau of Old-Age and Survivors Insurance. May 10, 1948, 12:59 p.m., San Francisco Area Office Accounting Section. [80]

PRI 'E MARKETING AGREE MENT

88

THIS AGREEMENT made by and between

a non-profit, co-operative marketing association, hereinafter called the Local, first party, and the undersigned Grower, second party.

WITNESSETH:

IN CONSIDERATION of the mutual obligations herein expressed and of the membership of the Grower in the Local, and in accordance with similar obligations undertaken by others, the parties agree:

1. Local agrees to buy and the Grower agrees to sell and deliver to the Local all of the prunes produced or acquired by or for him in California during the years _____ to _____ inclusive. This agreement may be terminated at any time during any year after _____ by the Local or by the Grower by a notice mailed to the Grower or the Local by registered mail between February 15th and the last day of February of said year; said termination to take effect on March 15th of the year in which said notice is delivered; provided, however, that this agreement shall remain in full force and effect as to all prunes delivered to the Local prior to such termination and until the sale of such prunes and the payment of the proceeds thereof to the Grower. Notice must be mailed within the period named herein to be effective, and shall be mailed to the Local at its principal place of business and to the Grower at his last known address.

2. The Grower expressly warrants that he is now in a position to control said crops and would be able to deliver according to this agreement; and that he has not heretofore contracted to sell, market or deliver any of the said prunes to any person, firm or corporation. If he has so contracted, he shall so state at the end of this agreement, and any crops covered by any such existing written agreement shall be excluded from the terms hereof to the extent and for the time there indicated.

3. (a) All prunes shall be delivered by the Grower at the earliest reasonable time when ready; and, in any event, prior to December 15th in each year, as and where directed by the Local or the Central Sales Agency hereinafter referred to. Where the packing plants of the Local or its subsidiary are distant from the common delivery points, the Local may, in its discretion, assume the cost of transportation from the common shipping points to its packing plants.

But delivery shall not be deemed to have been made hereunder except at the plants or grading points designated by the Local or the Central Sales Agency hereinafter referred to.

(b) Any deduction or charge or loss that the Local or the Central Sales Agency may make or suffer on account of inferior grade, quality or condition at delivery, shall be charged against the Grower individually.

(c) The Local or the Central Sales Agency shall make rules and regulations regarding handling and delivering, and provide inspectors and graders to standardize, grade and classify the prunes, and the Grower agrees to observe and perform any such rules and regulations and to accept the grading and standards established by the Local or the Central Sales Agency.

(d) All prunes shall be delivered in properly dried and merchantable condition. The determination of the Local or the Central Sales Agency as to grade, standard and classification and differentials in prices, shall be conclusive.

4. The Local or the Central Sales Agency shall pool or mingle the prunes of the Grower with prunes of a like quality or grade delivered by other growers. The Local or the Central Sales Agency shall classify prunes by size, grade, variety or any other commercial standards; and this classification shall be conclusive.

5. The Local agrees to resell such prunes, together with prunes of like quality, grade and classification delivered by other growers under substantially similar contracts in their original form, or manufactured or as by-products or otherwise at the best prices obtainable under market conditions and to pay over the net amount received therefrom as payment in full to the Grower and Growers named in contracts substantially similar hereto, according to the value of the prunes delivered by each of the growers after deducting therefrom the costs of receiving, handling, packing, manufacturing, storing, depreciation, advertising and marketing, and an investment charge of not to exceed 3% of the gross resale proceeds. From this charge, a commercial reserve may be created and deductions made for the creation of the capital funds of the Local, provided for by the by-laws thereof. The annual surplus from any deductions made by the Local and not prorated to any specific fund must be prorated among the growers delivering prunes in that year on the basis of their respective deliveries.

6. (a) The Grower agrees that his prunes shall be so mingled and that the net returns therefrom, less all costs, advances and charges, shall be paid to him on a proportional basis, considering all differentials and adjustments, out of the receipts from the sale of all prunes of like quality, grade and classification.

(b) The Local agrees to pay as substantial an advance payment on the prunes as the market and financial conditions will permit, as determined by the Board of Directors in each season and such payments shall be made as soon as practicable after delivery of the prunes to it; and such advance payments may be proportionately higher for fruit classified in more desirable grades or sizes from a commercial standpoint.

(c) Payment on each pool shall be made from time to time, as rapidly as possible, in due proportion, until the accounts of each pool of the season are completely settled.

7. This Local may exercise all of the packing, marketing and grading and inspection or other powers and rights herein granted to it, and perform all obligations herein assumed by it, through California Prune and Apricot Growers Association as a Central Sales Agency, the Grower recognizing that this Local has or will become a member of the California Prune and Apricot Growers Association and has or will contract with the California Prune and Apricot Growers Association to deliver all of the prunes and apricots handled by it to the California Prune and Apricot Growers Association for packing and marketing, and the Grower agrees that the Local may enter into any contract with the California Prune and Apricot Growers Association for such purposes and may agree to pool the prunes delivered hereunder with prunes of a similar grade and quality delivered by similar Locals under marketing agreements substantially similar to this, and the proceeds thereof shall be divided ratably according to deliveries from such Locals and shall be distributed to the grower members thereof as above provided.

Any cost of maintaining the California Prune and Apricot Growers Association shall be prorated among the said Locals on the basis of the gross sale value and quantity of the prunes delivered by them respectively and shall be considered for all purposes as a part of the costs and deductions provided for in Paragraph 3 hereof.

8. The Grower agrees that title to said prunes passes absolutely to the Local upon delivery thereof by the Grower to the Local and that the Local may transfer title to the Central Sales Agency, and the Grower agrees that the Local or the California Prune and Apricot Growers Association shall have and it is hereby given the power to borrow money and to incur indebtedness in the manner and to the extent as provided in the agreement between the Local and the California Prune and Apricot Growers Association.

9. The Grower shall have the right to retain and to sell all or part of his fruit green for green use or canning only; and only to persons, firms, or corporations approved and listed by the Local or Central Sales Agency in its regular publication or by notice to the growers, as approved Buyers.

10. If this agreement is signed by the members of a co-partnership it shall apply to them and each of them individually in the event of the dissolution or termination of the said co-partnership.

11. If the Grower transfers any or all of his prune orchard or any or all of the prunes owned or controlled by him to any person, firm or corporation, on or after March 15th of any calendar year, any such transfer shall be deemed to be subject to this contract during the calendar year in which such transfer shall have been made, providing that this contract shall not have been terminated in such year, and such transferee shall be deemed to be obligated to deliver the prunes hereunder. In the event of the failure of the transferee to deliver said prunes, the Grower shall be obligated to the Local for liquidated damages hereinafter provided on the basis of the amount of fruit covered directly or indirectly by such transfer, in addition to the other remedies granted herein.

12. This agreement is one of a series generally similar in terms comprising with all such agreements, signed by individual growers, or otherwise, one single contract between the Local and the said Growers, mutually and individually obligated under all of the terms thereof. The Local shall be deemed to be acting, in its own name, for all such growers in any action or legal proceedings on or arising out of this contract.

13. (a) Inasmuch as the remedy at law is and would be inadequate and inasmuch as it is now and ever will be impracticable and extremely difficult to determine or fix the actual damage resulting to the Local if the Grower fails to sell and deliver to the Local all of said prunes as herein provided, the Grower agrees to pay to the Local as liquidated damages for the breach of this contract in that regard twenty percent (20%) of the total market value of the prunes withheld, delivered, sold, consigned or marketed by or for him other than in accordance with the terms of this agreement, said market value to be determined as of the time that demand for shipment of said prunes is made by the Local, or if said prunes have been sold by the Grower, then the price for which said prunes shall have been sold shall be taken as the market value thereof.

(b) If the Local brings any action against the Grower to enforce any provision of this agreement or to secure specific performance hereof or to collect damages of any kind for any breach hereof, the Grower agrees to pay to the Local all costs of court, costs for bonds and otherwise, expenses of traveling and all expenses arising out of or caused by the litigation, including a reasonable attorney's fee expended or incurred by the Local in any such proceeding, and all costs and expenses shall be included in the judgment obtained in said action.

14. All books, accounts and other documents affecting the business to be carried on by the Local shall at all times during business hours be open to the inspection of the Grower or any person designated by him who may present proper evidence of authority to make such examination.

15. The parties agree that there are no oral or other conditions, promises, covenants, representation or inducements in addition to or at variance with any of the terms hereof, and that this agreement represents the voluntary and clear understanding of both parties fully and completely.

READ CONSIDERED AND SIGNED AT

California,

this _____ day of _____, 19____

Grower

ACCEPTED, this _____ day of _____, 19____

P. O.
Address

Association,

By _____ Secretary.

CASE NO.

EXHIBIT

12-1093
12-1094
12-1095

CALIFORNIA PRUNE AND APRICOT GROWERS ASSOCIATION

LOCAL-CENTRAL CONTRACT

THIS AGREEMENT made and entered into this _____ day of _____ 19____ by and between the CALIFORNIA PRUNE AND APRICOT GROWERS ASSOCIATION, a non-profit, co-operative marketing association organized under the laws of the State of California, hereinafter referred to as the Central Sales Agency, first party, and various local marketing associations, corporations organized and existing under the laws of the State of California, hereinafter referred to as Locals, of which the undersigned is one, second parties,

WITNESSETH:

WHEREAS the second parties have been organized for the purpose of marketing the prune, apricot and other dried fruit products of their members, and second parties desire to unite in the marketing of their products for the purpose of obtaining the further benefits of co-operation in distributing through a common sales agency,

NOW, THEREFORE, in consideration of the premises and the mutual covenants on the part of each of the parties herein contained, it is agreed:

1. TERM OF AGREEMENT.

(a) This agreement shall be effective as of _____, 19____, and shall continue in full force and effect until December 31, 1958, unless sooner terminated as to one or more or all of the parties hereto at the time and in the manner herein provided.

(b) The Local, if said Local has acquired from the Central Sales Agency, or otherwise where the Central Sales Agency has no suitable property, the facilities to receive, store and pack the fruit of its members, may withdraw from this agreement as of March 15th of any year, provided said withdrawal shall have been authorized by a two-thirds vote of its membership at a meeting held after ten days' notice to its members and to the Central Sales Agency, and the Central Sales Agency may terminate this agreement as to one or more Locals as of said date, upon giving written notice to the other of such party or parties during the period from March 1st to March 10th of said year of their intention to so withdraw or terminate. Said notice shall be complete when deposited by Central Sales Agency or Local in the United States Post Office, registered mail, at the place where the principal place of business of Central Sales Agency or Local is at the time situated, postage fully prepaid, said notice to be addressed to said Central Sales Agency or Local or Locals, as the case may be, at the place or places where at the time its principal place of business is situated.

Said notice must be mailed within the period stated herein to be effective. Withdrawal or termination of this agreement shall not affect in any manner any of the parties hereto not withdrawing, as to which parties this agreement shall remain in full force and effect and shall not affect any prunes, apricots or other dried fruits delivered by the Locals by which or as to which said contract is terminated prior to such termination, and such prunes, apricots and other dried fruits shall be handled and marketed the same as if said contract were continued in full force and effect.

2. PURCHASE AND SALE OF PRUNES, APRICOTS AND OTHER DRIED FRUITS.

The Central Sales Agency agrees to buy and the Local agrees to sell and deliver to the Central Sales Agency all of the prunes, apricots or other dried fruits produced or acquired or controlled by such Local during the time this agreement shall be in force as to said Local.

The term apricots herein shall include apricot pits from dried apricots, and all provisions for the marketing, pooling and distribution of proceeds of prunes, apricots or other dried fruits shall apply thereto.

3. GRADES AND QUALITY.

The Central Sales Agency shall have full and complete power and authority to prescribe and enforce such rules and regulations and standards regarding the handling, delivering, grading, classifying, processing, and manufacturing such prunes, apricots and other dried fruits, as its Board of Directors shall determine and each Local agrees to strictly and promptly conform to such rules and regulations and to standardize, grade, classify, process, and manufacture the prunes, apricots and other dried fruits in accordance with the instructions of the inspectors appointed by the Central Sales Agency. The standards to be established by the Central Sales Agency shall be based on the quality of fruit and not on geographical lines or district representation.

All prunes, apricots and other dried fruits shall be delivered in properly dried and merchantable condition and each Local shall be responsible for the quality and grade of any and all prunes, apricots and other dried fruits sold and delivered by it to the Central Sales Agency under this agreement and no charge shall be made against any pool to which such prunes, apricots and other dried fruits belong on account of the fact that such prunes, apricots and other dried fruits are not of the proper quality when delivered, but such loss shall be borne entirely by the Local delivering the same.

The Local, when it shall have facilities so to do, shall pack all prunes, apricots or other dried fruits received by the Local and sold through the Central Sales Agency in containers as may be directed by the Central Sales Agency, it being understood and agreed that no Local without the consent of the Central Sales Agency shall pack prunes, apricots or other dried fruits in specialty packages, such as cartons or the like. If the Central Sales Agency shall pack prunes, apricots or other dried fruits in such specialty packages, the Locals shall ship prunes, apricots or other dried fruits to the Central Sales Agency as requested by it to be used for such purposes. The Local when it shall have packing facilities, shall receive an allowance to be fixed on a uniform basis annually for all Locals for prunes, apricots and other dried fruits shipped by it to or at the direction of the Central Sales Agency, such allowance to be based on the type of package in which said prunes, apricots or other dried fruits shall be shipped, such as boxes, bags or the like, and which allowance shall be paid to the Local for the costs incurred by it in receiving, handling, and shipping the prunes, apricots and other dried fruits delivered to it. Such allowance shall be at least equal to the average cost incurred by the Central Sales Agency in similar operation of other plants and shall be paid to the Local on all prunes, apricots and other dried fruits shipped by it as soon as possible after the proceeds for said prunes, apricots and other dried fruits have been received by the Central Sales Agency.

4. The Central Sales Agency agrees to resell such prunes, apricots and other dried fruits, together with prunes, apricots and other dried fruits of like quality, grade, and classification delivered by other Locals under similar contracts at such prices and at such time as in its judgment and discretion it deems best for the interest of all Locals and to pay over the net amounts received therefrom as payment in full to the Locals according to the value of the prunes, apricots and other dried fruits delivered by each of them after deducting therefrom, within the discretion of the Central Sales Agency, the cost of receiving, processing, manufacturing, handling, storing, transportation, advertising and all other expenses of marketing and also such other deductions for reserves or revolving capital funds as may be created, which said deductions for capital purposes shall not exceed 5% of the gross sale proceeds, all of such deductions to be determined from time to time in the discretion of the Board of Directors of the Central Sales Agency.

5. The Central Sales Agency is authorized by the Local to resell said prunes, apricots and other dried fruits either through agents or brokers or through such channels of distribution as in its judgment it shall deem advisable. The Central Sales Agency is hereby authorized to and shall pool or mingle said prunes, apricots and other dried fruits with the prunes, apricots and other dried fruits delivered by other Locals under agreements generally similar to this. The Central Sales Agency is hereby given full power and authority to and shall have the right to amend, change or modify classifications or pools and to or to establish additional pools or to abolish or change rules or time limits of said pools or any of them.

To enable the Central Sales Agency to better and more economically market the prunes, apricots and other dried fruits delivered to it by the respective Locals and to eliminate the possibility of favoritism in marketing and to insure to each Local a fair and equitable distribution of the proceeds received upon sales made, all of the prunes, apricot and other dried fruits to be marketed through the Central Sales Agency shall be pooled whenever possible under such uniform rules and regulations and standards as may be adopted by the Board of Directors of the Central Sales Agency, and all proceeds from the sale of the respective pools so established shall be distributed to each Local proportionate to its interest therein.

The Central Sales Agency is hereby given full power and authority to determine to which pool as herein mentioned any prunes, apricots or other dried fruits of Locals shall belong and for that purpose shall have power from time to time to inspect, and authority is hereby given to it by Locals to inspect, all prunes, apricots and other dried fruits on the delivery thereof and to inspect all operations in the preparation of such prunes, apricots or other dried fruits for market, such prunes, apricots and other dried fruits to be inspected by inspectors designated by the Central Sales Agency.

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EXHIBIT

In the event of any disagreement between the Central Sales Agency and the Local as to which of the pools herein mentioned said prunes, apricots or other dried fruits belong or should be assigned, the decision of the Board of Directors of the Central Sales Agency thereon shall be final and conclusive.

Prunes, apricots and other dried fruits of special grade or quality not conforming to any of the standard classifications as established by the Central Sales Agency may be sold for the account of the individual Local furnishing the same as determined in the discretion of the Board of Directors of the Central Sales Agency.

The Central Sales Agency is hereby authorized to establish brands or trademarks and to market said prunes, apricots or other dried fruits under said brands or trademarks and Locals shall not have the right to place upon containers any marks or brands except as is permitted by the Central Sales Agency. Any and all trademarks or trade names used or employed by the Central Sales Agency are and shall be its sole and separate property and no Local shall have, nor shall any member or stockholder of any Local have, any right or interest or claim thereof, and the time, place and manner of use and supply of said trademarks and trade names shall be solely as prescribed from time to time by the Central Sales Agency.

6. Proceeds of resales of prunes, apricots and other dried fruits shall be distributed to Locals from time to time as received by the Central Sales Agency and as rapidly as the Central Sales Agency in its judgment believes that marketing and financial conditions justify.

In making distributions, the Central Sales Agency shall consider and establish differentials between such pools and from time to time shall change or modify such differentials as the Directors of the Central Sales Agency shall determine reasonable in view of market conditions.

All assessments or expenses of the Central Sales Agency against Locals shall be made in such manner as the Directors of the Central Sales Agency shall deem just and proper and justified as to all pools, and shall be assessed against each of the Locals under like uniform rules and regulations depending primarily upon the actual cost of the service rendered and the value or volume of the business transacted.

The parties hereto agree and it will be conclusively held that the title to said prunes, apricots and other dried fruits passes absolutely and unreservedly to the Central Sales Agency upon delivery by members of the Local of said prunes, apricots and other dried fruits to a packing house or receiving plant of said Local or Central Sales Agency or a grading point designated by the Local or Central Sales Agency. Each Local expressly agrees that the Central Sales Agency shall have the power and it is hereby given the power to borrow money and to incur obligations in its name and on its own account for any purpose on the prunes, apricots or other dried fruits delivered to it, upon their drafts, acceptances, notes or otherwise, or on any warehouse receipt or bills of lading or upon any accounts for the sale of said prunes, apricots or other dried fruits or any commercial paper delivered therefor, and to exercise all rights of ownership over the same without limitation and to pledge in its own name and for its own account such prunes, apricots and other dried fruits, drafts, bills of lading, warehouse receipts, notes, acceptances, orders or other commercial paper as collateral.

Out of the funds so received, the Central Sales Agency shall advance to the respective Locals after making necessary deductions for its estimated expenses such proportion thereof as the value of the products to be marketed by each bears to the total value of all products so to be marketed; such advance to be made as soon as practicable after delivery.

No person lending money on security of said prunes, apricots and other dried fruits or dealing with the Central Sales Agency pursuant to authority conferred upon it by this agreement shall be under any duty to see to the application of the proceeds of said loan.

7. Losses.

In the event that any loss occurs by reason of the failure or inability of the purchaser of prunes, apricots or other dried fruits to pay therefor, or in the handling or shipping of the prunes, apricots and other dried fruits after the same have been shipped at the instruction of the Central Sales Agency, such loss shall be borne by and charged against and be an expense upon all of the pools of prunes, apricots or other dried fruits of that crop and shall be met in the same manner and according to the same basis of proportion as other items of expense of the Central Sales Agency.

Where a Local has packing facilities, any loss in prunes, apricots or other dried fruits arising out of the failure of the Local to properly handle or care for such products shall be charged to the Local causing the same.

All books, records, accounts, and other documents affecting the business to be carried on by the Central Sales Agency shall at all times during business hours be open to the inspection of the Locals or any person designated by them who may present proper evidence of authority to make such examination. The books, records, accounts, transactions, and agreements of the Locals concerning such matters shall be similarly open to the Central Sales Agency. The Central Sales Agency shall perform such accounting for the Locals as it may be requested to do by them, and shall receive therefor the actual costs of such accounting.

8. REMEDIES.

(a) Inasmuch as the remedy at law is and would be inadequate and inasmuch as it is now and ever will be impracticable and extremely difficult to determine or fix the actual damage resulting to the Central Sales Agency if the Local fails to sell and deliver to the Central Sales Agency all of said prunes, apricots and other dried fruits and apricot pits as herein provided, each Local agrees to pay to the Central Sales Agency as liquidated damages for the breach of this contract, in that regard twenty per cent (20%) of the total market value of the prunes, apricots or other dried fruits or apricot pits withheld, delivered, sold, consigned or marketed by or for it other than in accordance with the terms of this agreement; said market value to be determined as of the time that demand for delivery of said prunes, apricots or other dried fruits is made by the Central Sales Agency, or if said prunes, apricots and other dried fruits have been sold by the Local, then the price for which said prunes, apricots or other dried fruits shall have been sold shall be taken as the market value thereof.

(b) All of the parties hereto agree that by reason of the nature of this agreement, the Central Sales Agency is entitled to the remedies of specific performance and injunction as provided by the laws of the State of California for co-operative marketing associations to prevent a breach or further breach of this agreement.

(c) If the Central Sales Agency brings any action against any Local to enforce any provision of this agreement or to secure specific performance hereof, or to collect damages of any kind for any breach hereof, the Local agrees to pay to the Central Sales Agency all costs of court, costs for bonds and otherwise, expenses of traveling and all expenses arising out of or caused by the litigation, including a reasonable attorney's fee expended or incurred by the Central Sales Agency in any such proceeding and all costs and expenses shall be included in the judgment obtained in said action.

(d) The Local agrees that any right or remedy which it has or may have against a grower-member which right or remedy the Local fails to enforce against said grower-member within ten (10) days after request so to do made by Central Sales Agency may be exercised and enforced by the Central Sales Agency either in the name of the Central Sales Agency or in the name of the Local or both as Central Sales Agency deems advisable and any recovery made by the Central Sales Agency in the enforcement of remedy or right shall be and become the property of the Central Sales Agency.

9. It is expressly agreed that this instrument is one of a series substantially identical in terms. All of such instruments shall be deemed one contract for the purpose of binding the signers, to the same extent as if all of the subscribers had signed only one such contract.

10. The parties agree that there are no oral or other conditions, promises, covenants, representations, or inducements in addition to or at variance with any of the terms hereof, and that this agreement represents the voluntary and clear understanding of both parties fully and completely.

Signed at _____, California,

this _____ day of _____, 19____ Local

by

Accepted at San Jose, California

this _____ day of _____, 19____

CALIFORNIA PRUNE AND APRICOT GROWERS ASSOCIATION,

by

Secretary

(SEAL)

[Endorsed]: No. 12496. United States Court of Appeals for the Ninth Circuit. Oscar R. Ewing, Federal Security Administrator, Appellant, vs. Mary R. Baiocchi, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 10, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12496

OSCAR R. EWING, Federal Security Administrator,

Appellant,

vs.

MARY R. BAIOCCHI,

Appellee.

APPELLANT'S STATEMENT OF THE
POINTS ON WHICH HE INTENDS TO
RELY UPON APPEAL, AND DESIGNA-
TION OF THE RECORD ON APPEAL.

Comes now the appellant in the above matter and presents his statement of the points on which he intends to rely on appeal, as follows:

1. Appellant adopts as his statement of the points on which he intends to rely the "Statement of Points to be Relied on by Defendant on Appeal," filed in the District Court in the above action and included in the transcript of record filed in this Court.

Appellant designates the entire Clerk's transcript of the record, which includes the transcript of the proceedings before the Referee of the Federal Security Agency, together with the following exhibits—C, E, F, K, and L, to be printed.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant United States Attorney, Attorneys for
Appellant.

[Endorsed]: Filed March 22, 1950.

**In the United States Court of Appeals
for the Ninth Circuit**

**OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR,
APPELLANT**

v.

MARY R. BAIOCCHI, APPELLEE

**ON APPEAL FROM THE ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALI-
FORNIA, SOUTHERN DIVISION**

BRIEF FOR APPELLANT AND APPENDIX

H. G. MORISON,
Assistant Attorney General,

FRANK J. HENNESSY,
United States Attorney,

C. ELMER COLLETT,
*Assistant United States Attorney,
Attorneys for Appellant.*

Of Counsel:

**EDWARD H. HICKEY,
HUBERT H. MARGOLIES,**
Attorneys, Department of Justice.

LEONARD B. ZEISLER,
Attorney, Federal Security Agency.

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U.S. DEPT. OF JUSTICE

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**In the United States Court of Appeals
for the Ninth Circuit**

No. —

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR,
APPELLANT

v.

MARY R. BAIOCCHI, APPELLEE

*ON APPEAL FROM THE ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALI-
FORNIA, SOUTHERN DIVISION*

BRIEF FOR APPELLANT AND APPENDIX

JURISDICTIONAL STATEMENT

Plaintiff brought suit in the United States District Court for the Northern District of California, Southern Division, to review, pursuant to Section 205(g) of the Social Security Act as amended (42 U.S.C. Sec. 405(g), 53 Stat. 1360, 1370), a denial of a widow's current insurance benefits and child's insurance benefits. These benefits were denied on the ground that the wage-earner, Almando Baiocchi, was not entitled to additional wage credits and quarters of coverage because his services in processing fruits for a farmers' marketing cooperative after December 31, 1939, were in "agricultural labor" as defined by Congress in its August 10, 1939 amend-

ments to the Social Security Act, and as such were outside the coverage of the Social Security Act as amended.

The jurisdiction of this court to review the order of the district court is sustained by Section 205(g) of the Social Security Act as amended, and by 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Northern District of California entered January 10, 1950, reversing the decision of the Federal Security Administrator¹ denying benefits, and directing that the Social Security Administration recompute the benefits applied for by including, as part of the deceased wage-earner Baiocchi's total statutory wage credits, payments made to him for fruit processing from January 1, 1940 through 1944.

The decision reversed by this order of January 10, 1950, was that Baiocchi's processing services in that period were in excluded "agricultural labor" as defined in Section 209(1)(4) of the Social Security Act as amended, 42 U.S.C. Sec. 409 (1) (4), 53 Stat. 1360, 1377, and therefore did not give rise to "wages" in determining his number of quarters of coverage and fully or currently insured status at the time of his death.

A. The Administrative Proceedings

Mary R. Baiocchi, the widow of Almando Baiocchi, applied to the Social Security Administration for sur-

¹ The administration of Title II of the Social Security Act was originally vested in the Social Security Board. By the President's Reorganization Plan No. 2, effective July 16, 1946 (Section 4, House Docket 595, 79th Congress, 2d Sess., 11 F. R. 7873, 60 Stat. 1095, set out in note under Section 133y-16 of Title 5, U. S. C.) it was abolished and its functions transferred to the Federal Security Administrator. The Social Security Administration is the operating branch of the Federal Security Agency which administers Title II of the Social Security Act. The Bureau of Old-Age and Survivors Insurance and the Office of the Appeals Council are constituent units of the Social Security Administration.

vivors insurance benefits, a widow's current insurance benefits for herself (42 U.S.C. 402(e)), and a child's insurance benefits for her minor children (42 U.S.C. 402(c)) under the provisions of Title II of the Social Security Act as amended (42 U.S.C. 401, *et seq.*). The right to Title II benefits depends on whether her deceased husband rendered services for wages of \$50 or more in covered employment for the seventeen calendar quarters required under Section 209(g) of the Act (42 U.S.C. 409(g)) to qualify him as a "fully insured individual," or in six calendar quarters in the three years before his death on July 8, 1945, as required under Section 209(h) to qualify him as a "currently insured individual." If his services after December 31, 1939 in processing fruit for a farmers' marketing cooperative association were in *covered* employment, his insurance status qualified his survivors to benefits; if they were in *excepted* employment, he enjoyed no status as a fully or currently insured individual, and his survivors were not entitled to benefits.

Plaintiff's application for benefits was denied. On November 3, 1947, she requested reconsideration. She was accorded a hearing before a referee of the Federal Security Agency who denied her claim. Her request for a review by the Appeals Council was denied. She then instituted the action in the district court.

The undisputed facts brought out in the hearing before the referee may be summarized briefly as follows:

Baiocchi was employed by the California Prune and Apricot Growers Association, a farmers' marketing cooperative, from 1939 to November 4, 1944. He received wage credits for his services prior to January 1, 1940, the effective date of the 1939 amendment enlarging the definition of "agricultural labor" (see 42 U.S.C. 409(b)), and for maintenance work thereafter.

The California Prune and Apricot Growers Association is a nonprofit cooperative agricultural and horticultural association without capital stock, organized May 1, 1922 under Division 6, Chapter IV (Section 1217) of the California Agricultural Code. Its articles of incorporation provide (Article II (i)) that "All activities of this Association shall be non-profit and cooperative in character; and shall be limited to activities arising out of the financing of its members or the production, marketing, selling, harvesting, drying, processing, packing, canning, storing, and handling of the agricultural and horticultural products of its members only." Membership is limited (Article VI (c)) to any prune, apricot, or other fruit grower, or the landlord or tenant, or lessor or lessee of orchards on which prunes, apricots, or other fruits are grown, provided the landlord or lessor receives all or part of his rental in prunes, apricots, or other fruits. Representatives of local prune, apricot, or other fruit marketing associations may be admitted to it on the same terms.

The cooperative acts as a marketing instrumentality for local associations ² through which individual grower members handle their produce. It deals mainly in dried prunes which it receives in a dried state. Its system of operations was as follows:

Each grower enters into a marketing agreement with a local and each local enters into an agreement with the California Prune and Apricot Growers Association. The local agrees to purchase from the grower all the prunes or other fruit he produces and the Association

² The members of the California Prune and Apricot Growers Association, the locals, are associations organized under the same chapter of the California Agricultural Code. Each of the constituent local associations has its own constitution and by-laws which, so far as here material, do not differ substantially from each other. The articles of the Glenn County Prune and Apricot Growers, Inc., a typical local, are in the record. They state that

agrees to buy them from the local. The grower dries the prunes and delivers them to a packing house, receiving plant, or grading point designated by the local or the Association. There they are weighed, graded, and classified by standards prescribed by the Association and then are pooled and put in storage until the Association receives an order for certain types. They are then processed, packed, and shipped. Only fruit produced by members is handled.

The Association agrees to sell the prunes at such prices and times as it deems best for the locals, to whom the proceeds are distributed in the proportion the value of the products to be marketed for each bears to the total, less expenses of marketing. The local pays growers on a similar basis. The amounts payable to growers are undetermined until the seasonal crop is sold by the Association, when the proceeds are distributed. The "demand and trade custom" at the present time is that the prunes be graded for quality and size, sterilized, and put into consumer packages before being marketed. These are the services performed by the Association, and by the decedent for the Association.

The referee described the marketing arrangement the farmer has with the Association in the following terms:

"The grower brings his prunes to one of the packing houses operated by the Association and upon delivery and inspection thereof by the Association is given a receipt for such delivery. At the time the receipt is given, the fruit is received and

it is a nonprofit cooperative agricultural association without capital stock, and specifically authorize it to federate with other nonprofit cooperative agricultural associations organized and operated for substantially the same purposes and to become a member of the California Prune and Apricot Growers Association as central sales agency. Its purposes and membership are limited like those of the central agency itself.

the matter is reported to the accounting office of the Association, and the grower is paid an 'advance payment' which is 65% of the field price which prunes are then bringing. Thereafter and until the seasonal pack is totally sold, progress accountings and payments are made, and, at the time the entire seasonal pack is sold, the grower is given a final accounting and payment for prunes delivered to the Association in that season. The prunes, upon receipt are co-mingled with all other prunes in the packing house and are shipped as orders are received. Consequently, the prunes may remain in the packing house anywhere from two months to eighteen months, depending on the size of the pack and the condition of the prune market. So, it appears that in some instances a grower may wait as long as eighteen months for his final payment and accounting. After the prunes are delivered by the grower to the Association, he loses all control over them physically and under the contract he has with the local association, of which he is a member, he parts with sufficient title in those prunes to the Association to allow the Association to handle those prunes as outright owner. In this regard, the Association is empowered to borrow money, giving the prune pack in its possession as security therefor and do all of the things necessary or proper that any person, who is the outright owner of produce, might do with such prunes. However, it appears from the manner in which the title is handled that the grower continues carrying economic risk, as it cannot be determined what he will receive for his crop until the entire seasonal crop of all member growers is sold in full. In this regard, the transfer of the prunes from the grower to the Association differs from the transfer of produce from a grower to a commercial packer who purchases the produce outright at a market price, or any other price agreed upon between the grower and the commercial packer."

The referee found that the services rendered by the wage-earner since January 1, 1940, as a dried fruit

processor, excluding services rendered as a maintenance man, for the California Prune and Apricot Growers Association, a cooperative association, were within the exception and not the coverage. He, therefore, concluded that claimant was not entitled to the benefits for which she applied. When, on June 29, 1948, the Appeals Council denied a request for review, this became the final decision of the Federal Security Administrator.

B. The Proceedings in the District Court

Thereafter, plaintiff commenced this action under Section 205(g) of the Act as amended (42 U. S. C. 405(g), 53 Stat. 1360, 1370) to review and set aside the administrative decision. The Federal Security Administrator answered the complaint and in accordance with the requirements of Section 205(g) filed as part of his answer a certified transcript of the administrative record.

Section 205(g) of the Act as amended does not contemplate a trial *de novo*. It provides that the reviewing court "shall have power to enter upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Administrator."

In view of the limited nature of judicial review in proceedings authorized by Section 205(g) and the fact that the record before the court consists only of the pleadings, including the administrative transcript, it has been the practice to present the issue on motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure after the answer has been filed and served. *Walker v. Altmeyer*, 137 F. (2d) 531 (C. A. 2); *United States v. La Lone*, 152 F. (2d) 43 (C. A. 9); *Thompson v. Social Security Board*, 154 F. (2d) 204 (App. D. C.); *cf. National Broadcast-*

ing Co. v. United States, 319 U. S. 190, 227, affirming 47 F. Supp. 940, 946-947 (S. D. N. Y.); *Wawa Dairy Farms v. Wickard*, 149 F. (2d) 860, 864 (C. A. 3); *Watts v. Railroad Retirement Board*, 56 F. Supp. 840 (E. D. La.), affirmed 150 F. (2d) 113 (C. A. 5); *Taylor v. Latimer*, 47 F. Supp. 236 (W. D. Mo.). Plaintiff moved for summary judgment in this case. No new evidence was taken.

C. The Decision of the District Court

In the district court, Judge Harris wrote an extensive opinion of reversal (reported in 87 F. Supp. 520) on the plaintiff's motion for summary judgment, in which he held that the services were not excepted "agricultural labor." He held that the association's "operations are identical with those of the Rosenberg Brothers Corporation" (the commercial handler involved in *Miller v. Burger*, 161 F. (2d) 992, decided by this court); that "When Locals turn dried fruit over to the Central Sales Agency the fruit is in a merchantable state"; when delivered by the locals, "Payment of the purchase price is postponed, but *it is fixed* and the Central Sales Agency is subject to account to the Locals according to contract, by-laws and statute"; that "decendent worked for a terminal market for distribution for consumption after the dried fruit had reached the grocer's (*sic*) or terminal market". The court accepted the contentions that it was "axiomatic that the Court should be liberal in its interpretation," that the court was free to make its own determination of the scope of the statute, and that this court in *Miller v. Burger*, 161 F. (2d) 992, and *Miller v. Bettencourt*, 161 F. (2d) 995, in considering work performed in employment "identical" with that of Baiocchi, had ruled the plant was a terminal market and that the services were performed after all agricultural labor in connec-

tion with such dried fruit had ceased. Any distinction predicated on the cooperative status of the employer here was unsound, by virtue of *North Whittier Heights Citrus Association v. National Labor Relations Board*, 109 F. (2d) 76 (C. A. 9). The Act itself, the lower court stated, makes no distinction. Nor did the association come within the rationale of the exclusion, "the solicitude of Congress for the small farmer who is ill-equipped to maintain complex records on laborers who are hired on a strictly seasonal basis."

The court accordingly found that the wage-earner was in covered employment and that plaintiff was entitled to the benefits claimed.

The defendant appealed on February 14, 1950.

SPECIFICATION OF ERRORS RELIED UPON

The district court erred:

1. In failing to hold that the services were properly considered to be "agricultural labor" as defined in Section 209(1)(4) of the Social Security Act as amended (42 U. S. C. 409(1)(4)) and in the corresponding tax statute, Chapter 9 (A) of the Internal Revenue Code, 26 U. S. C. 1426(h)(4).

2. In holding that the California Prune and Apricot Growers Association was a terminal market for distribution for consumption.

3. In holding that the deceased wage-earner's work was performed after the dried fruit had reached (a) the grower's market or (b) the terminal market.

4. In holding that the court was free to make its own determination of the scope of the statute without proper regard for the practice evolved by the Federal Security Agency and the Bureau of Internal Revenue in coordinating the administration of the tax and benefit provisions, which had a reasonable basis in law.

5. In concluding that the decisions of this court in *Miller v. Burger*, 161 F. (2d) 992, and *Miller v. Bettencourt*, 161 F. (2d) 995, dealing with the workers of a commercial handler purchasing fruit outright, are controlling with respect to the coverage of workers of a nonprofit farmers' cooperative organized for the sole purpose of marketing their crop.

6. In substituting its own views of "agricultural labor" for the statutory definition adopted by Congress for Title II of the Social Security Act and the corresponding tax provisions.

7. In substituting the views of this court in *North Whittier Heights Citrus Association v. National Labor Relations Board*, 109 F. (2d) 76, for the statutory definition adopted by Congress for Title II of the Social Security Act.

8. In disregarding the Federal Security Administrator's findings and finding independently and without support in the record that when locals turn dried fruit over to California Prune and Apricot Growers Association (1) it is in a merchantable state and (2) payment of the purchase price is then fixed, although postponed.

9. In holding that the Social Security Act makes no distinction between nonprofit farmers' cooperatives and commercial handlers, and thereby (a) nullifying the exception of services such as grading, processing, and packing, incident to the preparation of fruits and vegetables for market, without regard to the Congressional purpose as established by the legislative history of the 1939 amendments to the Social Security Act and to the respect due the expertness of the Federal Security Agency, and (b) invalidating the regulations promulgated by the Social Security Administration.

10. In not holding that the farmer's economic concern over the return on his fruit is not at an end when his fruit reaches the cooperative and that he has not "parted with economic interest in its future form or destiny."

11. In not holding that the California Prune and Apricot Growers Association was an agent rather than a buyer or middleman, and that services for the Association were for the account of the growers.

12. In permitting the coverage of Title II of the Social Security Act and its artificial, statutory definition of "agricultural labor" to be extended by voluntary contributions of the California Prune and Apricot Growers Association.

13. In mistakenly assuming that the basic reason for excluding processing workers from coverage under the 1939 amendment to the Social Security Act was the difficulty the small farmer has in keeping records, and not the desire to relieve the smaller farmer from the impact and incidence of taxes imposed on fruit and vegetable processing which might be passed back to him, although large growers doing their own processing would not be subject to employment taxation.

14. In granting plaintiff's motion for summary judgment, and in reversing and remanding the cause.

STATUTES AND REGULATIONS INVOLVED

For the convenience of the court, the statutes and regulations herein involved are assembled in an appendix hereto (pp. 64-68, *infra*).

Prior to 1940, Title II of the Social Security Act excepted "agricultural labor" from employment without defining it. Section 210(b)(1) of the Act of August 14, 1935, 49 Stat. 625. Effective January 1, 1940 (42 U. S. C. 409(b)), agricultural labor was given a statu-

tory definition in Section 209(1) of the Act as amended (42 U. S. C. 409(1), 53 Stat. 1377) which provides in pertinent part as follows, for the period beginning January 1, 1940:

“(1) The term ‘agricultural labor’ includes all service performed—

“(4) *In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market.* The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.” (Italics supplied).

Social Security Administration Regulations 3, Part 403, Title 20, C.F.R., Section 403.803 (e) provides as follows:

“(e) Services described in Section 209(1)(4) of the Act:

“(1) Services performed by an employee in the employ of a farmer or a farmers’ cooperative organization or group in the handling, planting, drying, packing, processing, freezing, grading, storing, or delivering to storage or to market, of any agricultural or horticultural commodity, other than fruits and vegetables (see subparagraph (2) below), produced by such farmer or farmer-members of such organization or group of farmers are excepted, provided such services are performed as an incident to ordinary farming operations.

“Generally services are performed ‘as an incident to ordinary farming operations’ within the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers’ cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers’ organization or group. Services performed by employees of such farmer or farmers’ organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by persons other than such farmer or members of such farmers’ organization or group are not performed ‘as an incident to ordinary farming operations’.

“(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, provided such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may be excepted whether performed in the employ of a farmer, a farmers’ cooperative, or a commercial handler of such commodities.

“(3) The services described in subparagraphs (1) and (2) above, do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for consumption.”

QUESTIONS PRESENTED

1. Under the frame of reference of the 1939 amendments to the Social Security Act, are the workers of a farmers' marketing cooperative engaged in processing fruit in covered employment?

2. Is the question of coverage controlled by *Miller v. Burger*, 161 F. (2d) 992 (C.A. 9) and *Miller v. Bettencourt*, 161 F. (2d) 995 (C.A. 9), dealing with the processing employees of one of the world's largest commercial handlers, which purchased its fruit outright?

3. Will the decision below stand with *United States v. Colfax Grain Growers, Inc.*, 157 F. (2) 633 (C.A. 9)?

4. Was the court warranted in preferring previous judicial insights as to the category into which cooperatives fit to the statutory definition and the explicit economic objectives that Congress provided should govern the administration of Title II of the Social Security Act and Subchapters A and C of Chapter 9 of the Internal Revenue Code, and in subordinating the statutory definition to decisional analogies?

5. May a farmers' marketing cooperative validly be classified as a terminal market or a grower's market in any sense—real, statutory, or economic?

6. Did the district court give appropriate weight to the policy of Congress, to the determination of the expert body entrusted with the administration of Title II of the Social Security Act, and to the uniform regulations of the Social Security Administration and the Bureau of Internal Revenue?

7. Was the district court warranted in focusing on the benefit aspect of the problem and ignoring the correlative tax aspect?

THE LEGISLATIVE HISTORY OF THE 1939 AMENDMENTS

In the fruit industry particularly, the individual farmer's serious marketing difficulties and disadvantages and the increasing cost of mechanical equipment required to process and pack for market forced most growers into cooperatives or into dealings with commercial handlers. Under the 1935 Act, employment taxes were imposed on processing of fruit crops marketed through associations but not on crops marketed by large ranchers able to carry out their own integrated operations. The alleged unfairness and inequity of taxing the portion of the fruit crop distributed through cooperatives while exempting fruit marketed by large growers were vigorously portrayed. The aim was to eliminate the tax advantage, not by subjecting the large grower to new taxes but by relieving the small farmer from the burden of taxes reducing his return from farming operations. Congressman Buck espoused the cause, contending that the definition of "agricultural labor" applied by the Social Security Board and the Bureau of Internal Revenue inequitably discriminated against the members of cooperatives in favor of large growers financially capable of conducting a "complete agricultural operation from producing a crop to delivering for transportation to market." In his words, his amendment was designed to make it plain that "what is agricultural labor is determined by the *nature of the work* and not by whom the man is employed. Agricultural labor starts with planting a crop. It ends when that crop has been delivered to market or to a carrier for transportation to market, and all the intervening steps should be disregarded as in the nature of agricultural labor." 84 Cong. Rec. 6864, 6865 (June 8, 1939). The effect on the coverage of a cooperative's employces and others engaged in preparing fruits and vegetables for market received no specific mention.

Manifestly, they would be denied the coverage and benefits that would be available to industrial workers and others not within any exception to coverage.

The purpose of the 1939 agricultural labor exception as modified was authoritatively explained in the Committee Reports (H. Rep. No. 728, 76th Cong., 1st Sess., p. 51; S. Rep. No. 734, 76th Cong., 1st Sess., p. 61):

"The present law exempts 'agricultural labor' without defining the term. It has been difficult to delimit the application of the term with the certainty required for administration and for general understanding by employers and employees affected.

"Your committee believes that greater exactness should be given to the exception and that it should be broadened to include as 'agricultural labor' certain services not at present exempt, as such services are an integral part of farming activities. In the case of many of such services, it has been found that the incidence of the taxes falls exclusively upon the farmer, a factor which, in numerous instances, has resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones."

The Reports proceed to explain Section 209(1)(4) as follows (H. Rep. No. 728, 76th Cong., 1st Sess., pp. 52-53; S. Rep. No. 734, 76th Cong., 1st Sess., pp. 63-64):

"Paragraph (4) of the subsection extends the exemption to services (though not performed in the employ of the owner or tenant or other operator of a farm) performed in the handling, planting, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity, provided such service is performed as an incident to ordinary farming operation, or in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. . . . The expression 'as an incident to ordinary farming opera-

tions' is in general intended to cover all services of the character described in the paragraph which are ordinarily performed by the employees of a farmer or by employees of a farmers' cooperative organization, or group, as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such organization or group. . . .

"In the case of fruits and vegetables, however, whether or not of a perishable nature, services performed in the handling, drying, packing, etc., of those commodities constitute 'agricultural labor' even though not performed as an incident to ordinary farming operations, provided they are rendered as an incident to the preparation of such fruits or vegetables for market. Under this portion of the paragraph, for example, services performed in the sorting, grading, or sorting of ["citrus" appears at this point in H. Rep. No. 728, but not in S. Rep. No. 734] fruits or in the cleaning of beans, as an incident to their preparation for market, will be excepted irrespective of whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities."

SUMMARY OF ARGUMENT

It is incumbent on the courts, as on administrative agencies, to be responsive to changed policies reflected in Congressional legislation and to carry them out even when they are inconsistent with rules evolved by the courts before Congress took over in areas once left open for interpretation. *Harrison v. Northern Trust Co.*, 317 U.S. 476.

Prior to January 1, 1940, the effective date of the 1939 amendments, processing services were not within the exception for "agricultural labor" unless they were in the employ of the owner or tenant of the farm, under the Social Security Board's regulations. The 1935 Act merely excepted "agricultural labor." It left the

term undefined. The 1939 amendments were imbued with a new purpose, to improve the disadvantageous competitive position of the small grower (who, with insufficient volume and financing to process his fruit, had to absorb the cost of social security taxes on the processing operations) in relation to the large rancher who, in processing his own fruit, was relieved of social security taxes. It is unimportant whether the assumptions as to tax incidence are sound or even tenable, as long as Congress has signified its intention that cooperative marketing associations be relieved from employment taxes tending to reduce the small farmer's return from his operations. Congress endorsed the theory that a cooperative's separate existence does not detract from the substantial identity of its economic interest with that of its members. If, in trying to be practical, it failed to protect packing house workers as in the 1935 Act, the remedy is by corrective legislation.

That a farmers' marketing cooperative is neither a terminal market nor a "grower's market," permits of no doubt. Certainly Congress was not in doubt. Before the cooperative has disposed of the fruit, the grower's return is undetermined and unascertainable. Unlike the *Burger* and *Bettencourt* cases, where the processing was performed for one of the world's largest commercial handlers, which purchased its fruit outright, the services here were for a farmers' marketing cooperative that functions exclusively as a marketing agency for its grower members. Their direct concern over the return on the fruit is not at an end when the cooperative takes it in hand; until the cooperative has sold their fruit, their return is subject to all the vagaries of the market. Even though title may have passed *for convenience in marketing*, still the arrangement is for cooperative marketing. *Rhodes v. Little Falls Dairy Co.*, 230 A.D. 571, 245 N.Y. Supp. 432, 434, affirmed 256

N.Y. 559, 177 N.E. 140. Until the cooperative has sold the fruit, the grower has not parted "with economic interest in its future form or destiny." *Burger v. Miller*, 66 F. Supp. 619, 626 (S.D. Calif.), affirmed 161 F. (2d) 992 (C.A. 9). This court agreed that the commercial handler was a market only because the grower had parted with his economic interest in the fruit, its future form or destiny. It would have disagreed if the grower retained such interest. The referee's factual summary opinion is an explicit refutation of the contention that the cooperative functions as a market. See pages 5-6, *supra*. Even under a so-called "sales" contract, the cooperative needs and acquires no greater title than is necessary to accomplish its purpose, to obtain the power to give a full and unencumbered title for convenience in financing and in marketing operations. *San Joaquin Valley Poultry Prod. Assn. v. Commissioner*, 136 F. (2d) 382 (C.A. 9); *Bogardus v. Santa Ana Walnut Growers Assn.*, 41 Cal. App. (2) 939, 108 P. (2) 52; *Farmers Cooperative Co. v. Birmingham*, 86 F. Supp. 201, 215-216 (N.D. Iowa). It is an "agent" rather than a "buyer" in any real sense. Regardless of whether it operates under a "sales" or an agency contract, its activities are functionally integrated with farming activities in the sense of the Congress. Services for the Association were for the account of the grower within this court's *Burger* test, and were an incident to preparation for market within the statutory contemplation.

The interpretation of "market" and "terminal market" made by the court below stultifies the purpose of Congress by confining the exception to services already excepted under the 1935 Act despite the fact that even in determining what was an incident to ordinary farming operations Congress included services commonly performed by cooperatives. *United States*

v. *Colfax Grain Growers*, 157 F. (2d) 633 (C.A. 9). Fruit and vegetable growers were intended to be given even more preferential treatment by the exception of services incident to preparation for market. In taking as its standard for determining whether services come within the exception the form and condition in which fruit is customarily sold or disposed of by the ordinary grower, and shutting off cooperative activity by converting a cooperative into a market, the court excluded from the promised relief the very farmers intended to benefit from the expansion of agricultural labor.

Admittedly, exclusion from statutory "wages" of compensation for services rendered in a city, off the farms where the crop was harvested, on the ground that they were in agricultural labor, is anomalous. However, while the operations were performed under industrial conditions similar to those in the plant of a commercial handler, the work performed for a commercial handler is not in employment "identical" with Baiocchi's: his services were for a farmers' marketing cooperative which did not purchase outright. *In re Lazarus*, 294 N. Y. 613, 64 N.E. (2) 169, affirming 268 A.D. 547, 52 N.Y. Supp. (2) 682; *Michigan Unemployment Compensation Comm. v. Unionville Milling Co.*, 313 Mich. 292, 21 N.W. (2) 135. To attribute the agricultural labor *amendment* to the small farmers' difficulties in reporting on seasonal workers is unsupportable.

The statutory definition of "agricultural labor" is obviously artificial (*Fox v. Standard Oil Co.*, 294 U. S. 87, 95; *Western Union v. Lenroot*, 323 U. S. 490, 502) and may not be restricted in the light of the courts' own commonsensible views or their definitions of the term prior to specific legislation which in large measure was a reaction thereto. This court was free to construe "agricultural laborer" in *North Whittier*

Heights Citrus Assn. v. N. L. R. B., 109 F. (2d) 76 (C.A. 9), cert. den. 310 U. S. 632, as used in the Wagner Act. However, in the 1939 amendment to the Social Security Act, Congress specifically addressed itself to the matter and provided that for all agricultural commodities processing ordinarily performed by a farmers' cooperative was agricultural labor, and that for fruits and vegetables, the activity need only be an incident to preparation for market, even though not performed as an incident to ordinary farming operations, to be excepted. The amendment speaks clearly and unambiguously in terms of contraction of coverage.

The issue may not be disposed of simply by recourse to a rule of liberal construction, which in any event is only an auxiliary aid to the construction of statutes of doubtful meaning or applicability. *United States v. Colfax Grain Growers*, 157 F. (2d) 633, 636 (C.A. 9). The legislative history inhibits invocation of such a rule and demonstrates that the tax burden on the small farmer and not reporting difficulties was the reason for the broadened exception. The principle of liberal construction is inapplicable, for in Section 209(1)(4) the special solicitude of Congress for small farmers prevailed over the normal preference for coverage. Plainly Congress contracted coverage and did not transplant the *North Whittier* (109 F. (2d) 76) approach to cooperatives as the "true test" for determining whether the work has "an industrial hue." *Batt v. United States*, 151 F. (2) 949, 950 (C.A. 9).

ARGUMENT

POINT I

SERVICES AFTER DECEMBER 31, 1939, PROCESSING FRUIT IN THE EMPLOY OF A FARMERS' MARKETING COOPERATIVE ARE WITHIN THE SCOPE AND PURPOSE OF THE BROADENED AGRICULTURAL LABOR EXCEPTION**A. The Legislative History of the Congressional Definition Supports the Exception of the Services in Question**

The Social Security Act as amended, in its application to agricultural labor, is the culmination of a course of developments which simplifies the task of interpretation through reconstruction of legislative intention and demonstrates that the decision of the referee not only had reasonable basis in law but was inevitable.

Where the 1935 Act merely excepted "agricultural labor" without affording further guidance, the 1939 amendments broadened the exception in response to representations that leave no doubt that the previous criteria for deciding whether services were in agricultural labor were rejected and superseded by new criteria to narrow coverage. Previously it may have been justifiable to limit the exception to situations where reporting difficulties on the part of small farmers and administrative inconvenience were major obstacles to coverage and effective tax collection; the degree of industrialization, the specialization of the services, and the location and size of the establishment may have been pertinent in deciding whether particular services came within the presumed purpose of the exception. The 1939 amendments, however, took a new tack and left relatively little room for construction. Disavowing prospectively the old standards, they were infused with the conviction, right or wrong, that cooperative processing and marketing were each "an integral part of farming activities," that the farmer bore the brunt

of employment taxes imposed on marketing cooperatives and was unable to pass on such added costs of production to the consumer, and that relief from the impact of unemployment taxes and taxes for the support of the old age and survivors insurance program was necessary to remove a serious competitive disadvantage from the small farmer. The large farmer, it was assumed, would remain exempt from social security taxes on processing performed on his own farm on his own fruit and vegetables. On the other hand, the small farmer, to complete his operation, would have to have these services performed for him by a cooperative, which should be given the same exemption, else, it was postulated, the taxes imposed on the processor would be shifted back to him. The decision of the court below gave less than full play or hospitable scope to the major purpose of the 1939 amendment, to make certain that the small grower's fruits and vegetables would reach the market, where his effective prices were fixed, as free from social security taxes as the large ranch owner's.

The 1935 Social Security Act excepted "agricultural labor" from covered employment without enlarging. Admittedly, the words were general and might not embrace activities no longer customarily performed by individual growers, activities which in the evolution of farming had been taken over by larger aggregations, such as cooperatives, able to afford the outlay for plant, equipment, and specialized services. See *Batt v. United States*, 151 F. (2d) 949 (C.A. 9). As interpreted in the regulations issued by the Social Security Board, and by the Bureau of Internal Revenue (with the approval of the Secretary of the Treasury) in connection with collecting social security contributions, "agricultural labor" encompassed services performed in the processing, packaging, and marketing of agricultural

products only when they were performed by an employee of the producer and as "an incident to ordinary farming operations, as distinguished from manufacturing or commercial operations." This interpretation, as the Fifth Circuit observed, was "not so broad, perhaps as the dictionary might have permitted, but it dealt practically and reasonably with some of the borderline questions. . . ." *Fosgate Company v. United States*, 125 F. (2d) 775, 777 (C.A. 5). Disregarding the overlap between farming and industry, manufacturing and commerce, by testing services performed in processing, packing, and marketing agricultural commodities by the nature of the enterprise for which the services were performed and by requiring that they be performed for the producer, the agencies excluded employment which might perhaps have come within the term "agricultural labor" from its scope under the 1935 Act.

Due to the absence of standards, the likelihood, or expectation, that the exception for agricultural labor would itself be short-lived, and the acknowledged need of many "fringe" workers for social insurance protection, the Social Security Board was able to choose among the rival tests one attuned to the principal apparent reason for the exception from the old age insurance and unemployment compensation systems. The foremost reason was the administrative difficulty in ascertaining farm wages and collecting taxes on farm work. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 512-513; *Latimer v. United States*, 52 F. Supp. 228, 231 (S.D. Calif.); *H. Duys & Co. v. Tone*, 125 Conn. 300, 5 Atl. (2) 23, 25.³ The Board was then

³ Although administrative difficulties were assigned in the *Carmichael* case as a sufficient constitutional basis for the exclusion of agricultural works, other bases might have influenced the legislative exclusion. For example, growers might have been put in a favored class, as they were by the 1939 amendments. Cf. *Tigner v. Texas*, 310 U. S. 141; *United States v. Rock Royal Cooperative*,

free to search for a "common denominator," for lack of more tangible evidence of Congressional intention. Clearly it could not adopt as its test the *need* for the benefits of the social legislation (see Merrill G. Murray, *Can We Insure Domestic and Farm Workers*, 30 Am. Labor Legisl. Rev. 159 (Dec. 1940)) as the "common denominator of exclusion" (*cf. North Whittier Heights Citrus Assn. v. N. L. R. B.*, 109 F. (2d) 76 (C.A. 9), cert. den. 310 U.S. 632) for the need would not depend on the size of the farm and the validity of an administrative test that would exclude large farming operations and look only to the identity of the employer would be questionable. *Stuart v. Kleck*, 129 F. (2d) 400. Obviously, administrative difficulties were absent in enterprises predominantly commercial in nature, whose workers were paid in cash, as in comparable plants dissociated from farm produce and located in urban areas. The Board's concept of agricultural labor under the 1935 Act was, therefore, well adapted to restrict the applicability of the exception to those types of operations where administrative difficulties might be met.

The Board might have adopted a test of agricultural labor emphasizing the need for the Act's benefits (*cf. North Whittier Heights Citrus Assn. v. N. L. R. B.*, 109 F. (2d) 76, 79 (C.A. 9), cert. den. 310 U.S. 632) or it might have drawn the line at specialized services, as this court did in *Idaho Potato Growers v. N. L. R. B.*, 144 F. (2d) 295, 301 (C.A. 9), cert. den. 323 U.S. 769, where, in resolving a similar question under the parallel exception of agricultural laborers in the National Labor Relations Act, it stated:

"In determining whether or not the employees in the case are agricultural laborers, we must make

307 U.S. 533, 563, *et seq.*; *United States v. Colfax Grain Growers, Inc.*, 157 F. (2d) 633; *Waialua Agr. Co. v. Maneja*, 178 F. (2d) 603, 609 (C.A. 9); *Redlands Foothill Groves v. Jacobs*, 30 F. Supp. 995, 1004 (S.D. Calif.).

a sharp cleavage in the basis of our reasoning. We must determine that all persons who perform labor, which is sometimes done, and which some years ago was habitually done, by the farmer, are agricultural laborers; or we must consider the purposes of the Wagner Act and hold that employees who are not working at farming, but who are specializing in the preparation of farm products for trade or shipment after they have been reaped or gathered, are not agricultural laborers. In the cases of *North Whittier Heights Citrus Ass'n. v. N. L. R. B.*, 9 Cir., 109 F. (2d) 76, and *N. L. R. B. v. Tovrea Packing Co.*, 9 Cir., 111 F. (2d) 626, we took the latter line of reasoning. . . ."

Thus this court, like the Board in its regulations interpreting the 1935 Act, repudiated a literally possible test of agricultural labor which was regarded as inimical to the *general* purposes of the Act under consideration, in default of a more specific purpose. Its language, however, reveals awareness of other tests of agricultural labor yielding different results. ". . . generally the case definitions have grown out of special statutory phraseology or out of judicial effort to conform to legislative intent." *North Whittier Heights Citrus Assn. v. N. L. R. B.*, 109 F. (2d) 76, 79 (C.A. 9). Where the services were performed on the farm, the nature of the services rendered, rather than the character of the employer, has been made the test, in deference to the inherent force of the term "agricultural labor." *Stuart v. Kleck*, 129 F. (2d) 400 (C.A. 9); *Latimer v. United States*, 52 F. Supp. 228, 234 (S.D. Calif.). The character-of-the-services test is one which is supported by authority. *Carstens Packing Co. v. Industrial Accident Board*, 63 Idaho 613, 123 P. (2) 1001; *Batt v. Unemployment Compensation Division*, 63 Idaho 572, 123 P. (2) 1004; cf. *Cache Valley Turkey Growers v. Industrial Comm.*, 106 Utah 1, 144 P. (2) 537; dissenting opinion in *Cowiche Growers v. Bates*,

10 Wash. (2) 585, 117 P. (2) 624, 635. That test might have been adopted by the Social Security Board. By rejecting it the Board made it possible for identical services to be excepted agricultural labor or covered employment, depending on the business of the employer. As Arthur J. Altmeyer, Chairman of the Board, said in urging a clarification of the law when the 1939 amendments were under consideration (Hearings relative to the Social Security Act Amendments of 1939 before the Committee of Ways and Means, House of Representatives, 76th Cong., 1st Sess., p. 62, hereafter referred to as "Hearings") :

"Under the present law, a field worker of a large-scale vegetable-growing or marketing concern, may or may not be engaged in agricultural labor, depending on such factors as whether or not his employer was the grower or merely the purchaser of the crop. Likewise a worker employed in a processing operation may or may not be employed in agricultural labor, depending on whether the operation is sufficiently large and of such a character as to constitute conditions for the individual similar to industrial employment."

But no case has been found under the 1935 Act or similar legislation in which the mere size of an employer processing his own crops and the attendant specialization have prevented the exception for agricultural labor from being given effect. *Cf. Latimer v. United States*, 52 F. Supp. 228 (S. D. Calif.) ; *Edinburg Citrus Assn. v. N. L. R. B.*, 147 F. (2d) 353, 354 (C.A. 5) ; *In re Wenatchee Beebe Orchard Co.*, 16 Wash. (2) 259, 133 P. (2) 283 ; *Florida Ind. Comm. v. Growers Equipment Co.*, 152 Fla. 595, 12 So. (2) 889, 894-896 ; *American Sumatra Tobacco Corp. v. Tone*, 127 Conn. 132, 15 Atl. (2) 80. In *California Employment Comm. v. Bowden*, 52 Cal. App. (2) 841, 126 P. (2) 972, the court held that even if administra-

tive difficulties influenced the legislation, once the exception had been made, it could not be restricted to those classes of labor which would be seriously affected by those difficulties—that would confine the exception within limits unwarranted by the words themselves.⁴

In consequence of the regulations adopted by the federal agencies (which were followed by state unemployment compensation agencies) making the exception hinge on the character of the employer, the imposition of taxes on similar processing operations depended on the nature of the enterprise for which they were performed. Hence a grower was free from tax on the labor employed in packing his own fruit, although a farmers' cooperative and a commercial packer were not. *Batt v. United States*, 151 F. (2d) 949 (C.A. 9); *Latimer v. United States*, 52 F. Supp. 228, 235 (S.D., Calif.); *Fosgate v. United States*, 125 F. (2d) 775 (C.A. 5); *Lake Regional Packing Assn. v. United States*, 146 F. (2d) 157 (C.A. 5); *Internal Revenue Bureau Cumulative Bulletin XV-2*, p. 411, S.S.T. 10; *Florida Ind. Comm. v. Growers Equipment Co.*, 152 Fla. 595, 12 So. (2) 889. A fruit grower in Washington handling his own fruit paid no taxes (*In re Wenatchee Beebe Orchard Co.*, 16 Wash. (2) 259, 133 P. (2) 283) whereas a cooperative association of growers and a commercial handler whose help performed the same services were liable. *Cowiche Growers v. Bates*, 10 Wash. (2) 585, 117 P. (2) 624; *In re Yakima Fruit Growers Assn.*, 20 Wash. (2) 202, 146 P. (2) 800. On the liability of cooperatives, the decisions were conflicting—two states followed the federal rule and subjected farmers' marketing cooperatives to the same taxes as

⁴ As we point out *infra*, pp. 30-31, it was on the assumption that services in processing crops for a large farmer were and should be excepted that Congress broadened the exception in 1939 so as to restore and equalize the competitive position of the small farmer.

were imposed on commercial handlers (*Employment Security Commission v. Arizona Citrus Growers*, 61 Ariz. 96, 144 P. (2) 682; *Cowiche Growers v. Bates*, 10 Wash. (2) 585, 117 P. (2) 624) and two states reached the conclusion that no taxes were payable on the ground that the cooperatives were merely instrumentalities of the growers and tenants of the farm (*California Employment Commission v. Butte County Rice Growers Assn.*, 146 P. (2) 908, 914; *Industrial Commission v. United Fruit Growers Association*, 106 Colo. 223, 103 P. (2) 15, 17; cf. *Cache Valley Turkey Growers v. Industrial Commission*, 106 Utah 1, 144 P. (2) 537). On reconsideration, however, the California Supreme Court held the services were in covered employment in the *Butte County* case, 25 Calif. (2) 624, 154 P. (2) 892. In Idaho, the court adhered to the test of the character of the services rendered. *Carstens Packing Co. v. Industrial Accident Board*, 63 Idaho 613, 123 P. (2) 1001; *Batt v. Unemployment Compensation Division*, 63 Idaho 572, 123 P. (2) 1004. But cf. *Batt v. United States*, 151 F. (2d) 949 (C.A. 9).

This very tax on cooperatives was the "mischief" that supplied the impetus for the 1939 amendments. The difference between the tax burden on the marketing of the produce of growers doing their own processing and the marketing by cooperatives assumed great significance in the fruit industry, where, historically, the increasing cost of the mechanical equipment required to process and pack for market and satisfy stringent standards gradually forced the great majority of growers into cooperative associations equipped to perform these services and to market the products in the great consuming centers. Eighty per cent of the citrus fruit grown in Arizona and California is marketed through grower cooperatives (*Latimer v. United*

States, 52 F. Supp. 228 (S.D. Calif.) as is one-third of the fruit grown in Washington (*Cowiche Growers v. Bates*, 10 Wash. (2) 585, 117 P. (2) 624, 626. Parallel developments have occurred with respect to dried fruit.

The smaller growers' dependence on cooperatives for marketing made oppressively discriminatory employment taxes on the portion of the crop moving through cooperatives while immunizing the fruit marketed directly by the large growers. Vigorous objections were voiced as to the alleged unfairness of looking to the identity of the employer and the collectibility of the tax rather than to the impact of the tax on the small grower.

These voices did not go unheard or unheeded. When the 1939 amendments to the 1935 Act were under consideration by Congress, Representative Buck of California introduced legislation to eliminate this competitive disadvantage. His proposals are substantially embodied in what is now Section 209(1)(4) of the Social Security Act and Sections 1426(h)(4) and 1607(1)(4) of the Internal Revenue Code, 26 U.S.C. He contended that the definition of "agricultural labor" applied by the Social Security Board and the Bureau of Internal Revenue discriminated against cooperatives in favor of large producers financially able to carry through a "complete agricultural operation from producing a crop to delivering for transportation to market." As he explained it, the theory of the change in the statutory language was to establish that "what is agricultural labor is determined by the nature of the work and not by whom the man is employed. *Agricultural labor starts with planting of a crop. It ends when that crop has been delivered to market or to a carrier for transportation to market, and all the intervening steps should be regarded as in the nature of agricultural labor.*" 84

Cong. Rec. 6864-6865 (June 8, 1939). (Italics supplied.)

Congressman Buck's position was supported in the hearings on the amendments. It was urged strenuously that the average grower could not afford the equipment to perform various indispensable preparatory services for preparing fruit for market, including washing, grading, and processing fruits and vegetables, and was obliged either to join a cooperative to have the processing services performed or else to turn his produce over to a commercial handler for processing. In either event, his return would inevitably tend, it was argued, to reflect the cost of processing, including employment taxes. On the other hand, it was stressed at the hearings, large-scale farm or ranch operators whose volume justified maintenance of a processing or packing plant on their farms, were relieved of liability for social security taxes. See questions of Congressman Buck, Hearings, pp. 1349-1350; statement of Ivan R. McDaniel, representing the Agricultural Producers Labor Comm., Hearings, pp. 2028-2040; brief submitted by Mr. McDaniel in support of the Buck bill, Hearings, pp. 2040-2049.

The agricultural labor exception was then modified to eliminate the asserted tax inequity and competitive advantage enjoyed by the large farmers under the administrative definitions. We have already quoted from the Committee Reports on the bill (H. Rep. No. 728, 76th Cong., 1st Sess., pp. 51, 52-53; S. Rep. No. 734, 76th Cong., 1st Sess., pp. 61, 63-64) *supra* at pp. 16-17. They show conclusively that the exception was to "be broadened to include as 'agricultural labor' certain services not at present exempt, as such services are an integral part of farming activities," at least for the purpose of affording tax relief to the small farmer. For that purpose the divorce of the farmers' coopera-

tive from farming was regarded as form rather than substance. Specifically, processing of any agricultural commodity was to be exempted if performed "as an incident to ordinary farming operation;" the latter expression was "intended to cover all services of the character described in the paragraph [4] which are ordinarily performed by the employees of a farmer or by employees of a farmers' cooperative organization or group, as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such organization or group." In other words, *co-operative functions are included in the norm of what is an incident to ordinary farming operations*. This is not an unprecedented view. *United States v. Rock Royal Co-op.*, 307 U. S. 533, 562-563. The Capper-Volstead Act, Act of February 18, 1922, 42 Stat. 388, 7 U.S.C. 291, for example, authorizes farmers to act together in associations in "collectively processing, preparing for market, handling and marketing, in interstate and foreign commerce, [agricultural] products of persons so engaged." Toward fruit and vegetable growers, even greater favor was shown, for the Reports on the Social Security Act amendments state:

"In the case of fruits and vegetables, however, whether or not of a perishable nature, services performed in the handling, drying, packing, etc., of those commodities constitute 'agricultural labor' even though not performed as an incident to ordinary farming operations, provided they are rendered as an incident to the preparation of such fruits and vegetables for market. Under this portion of the paragraph, for example, services performed in the sorting, grading, or storing of fruits or in the cleaning of beans, as an incident to their preparation for market, will be excepted irrespective of whether performed in the employ of a

farmer, a farmers' cooperative, or a commercial handler of such commodities."

Despite the reference to commercial handlers in the last sentence of the quotation from the Committee Reports, this court has held in *Miller v. Burger*, 161 F. (2d) 992, and *Miller v. Bettencourt*, 161 F. (2d) 995, that services in the employ of a commercial handler buying the fruit outright⁵ are not excepted. The controversy between the parties hereto arises out of whether those cases constrain a denial of recognition to the classification of processing for cooperative marketing associations as farmer's work. In appellant's view, Congress clearly intended that cooperative processing be treated as an integral part of farming activities. Its explicit declaration is not to be stilled by overextending decisions to the effect that a commercial handler purchasing fruit outright is the farmer's market or a terminal market. Room for considerable difference of opinion as to a commercial handler purchasing outright and not on a fee basis may exist. Cooperatives fall in another category. See *Employment Security Commission v. Arizona Citrus Growers*, 61 Ariz. 96, 144 P. (2) 682, 684, recognizing the effect of the amendment on the coverage of packing house workers in the employ of a cooperative. Cooperatives are not within a fringe area but are plainly within the exception.

The 1939 amendments were specially designed to aid the small grower forced to join a cooperative, upon whom Congress thought the real incidence of the tax had fallen. Cf. *Hendricks v. Di Giorgio Fruit Corp.*, 49 F. Supp. 573, 575 (N.D. Calif.). Although aware that private operators have "increasingly tended to

⁵ See Em. T—Coll. Mim. 6219, December 31, 1947, as modified by Mim. 6239, March 1, 1948, particularly par. 6 (Exhibits N and O of the transcript of the proceedings before the Referee, which is a part of appellant's answer).

buy crops in the field or on the tree” (*Fosgate v. United States*, 125 F(2) 775, 778 (C.A. 5), Congress rejected the thesis that the agricultural operations were cut short and that harvesting and processing were inexorably “transferred to the business field.” To limit the agricultural labor exception for processing fruit to those services performed by the average grower before he parted with “title” to his crop disregards the Congressional policy concept of the role played by cooperatives and, indeed, adopts “an incident to ordinary farming operations” requirement which (a) is much narrower than the test of the Committee Reports and (b) was deliberately made inapplicable to fruits and vegetables. The limitation excludes from the “relief” the small growers who have to sell their fruit, the principal intended beneficiaries of the amendment. “To rule that exemptions in a remedial statute should be strictly construed without considering the effect of such construction on the clear purpose of the exemption would ignore the lawmakers’ intent.” *Hendricks v. Di Giorgio Fruit Corp.*, 49 F. Supp. 573, 575 (N.D. Calif.) ; *Waialua Agr. Co. v. Maneja*, 178 F. (2d) 603, 609 (C.A. 9) ; *McComb v. Hunt Foods, Inc.*, 167 F. (2d) 905, 908 (C.A. 9) ; *United States v. Colfax Grain Growers, Inc.*, 157 F. (2d) 633, 636 (C.A. 9).

B. The Regulations of the Social Security Administration and of the Bureau of Internal Revenue for the Tax Counterpart Substantially Reproduce the Language of the Authoritative Committee Reports

A casual inspection of the regulations issued by the responsible agencies covering the period beginning January 1, 1940 (Social Security Administration Regulations No. 3 (Title 20 C.F.R. (1940 Supp.)) Part 403, Section 403.808 (e)(2), (3) ; Treasury Regulation 106 (Title 26 C.F.R. (1940 Supp.)) Part 402, Section 208 (e)(2), (3), applicable to the Federal Insurance Contributions Act; and Treasury Regulation 107

(Title 26, C.F.R. (1940 Supp.)) Part 403, Section 208 (e) (2), (3) applicable to the Unemployment Compensation Tax) will show the fidelity and meticulousness with which the regulations follow the Committee Reports.

So far as pertinent to this case, these regulations uniformly provide:

“(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, provided such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans are performed as an incident to their preparation for market, such services may be excepted whether performed in the employ of a farmer or a farmers’ cooperative, or a commercial handler of such commodities.

“(3) The services described . . . above do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover since the excepted services described . . . must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of the commodity, such services do not, for example, include services performed as stenographers, book-keepers, clerks, and other office employees, even though such services may be in connection with such activities.”

Since the regulations conform to the authoritative Committee Reports, of which they are a replica, in

every particular and in every detail, and are consistent with the statute, they are manifestly valid and must be upheld. A regulation cannot be overturned unless it is unreasonable and plainly inconsistent with the statute. *Com'r. v. South Texas Lumber Co.*, 333 U. S. 496, 501; *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 413-414; *Skidmore v. Swift & Co.*, 323 U. S. 134; *White v. Winchester*, 315 U. S. 32, 41; *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294; *Bowles v. Wheeler*, 152 F. (2d) 34, 38 (C.A. 9); *State of California v. Fred S. Renauld & Co.*, 179 F. (2d) 605, 610 (C.A. 9); *L. Gillarde Co. v. Martinelli*, 169 F. (2d) 60 (C.A. 1); *Jones v. Gaylord Guernsey Farms*, 128 F. (2d) 1008, 1010 (C.A. 10). A regulation certainly cannot be condemned for reiterating the Committee Reports, almost *in haec verba*.

C. The Corollary of Tax Relief to Small Farmers Marketing Their Fruits Through Cooperatives Was the Withdrawal of Coverage from Workers Processing Fruit for Such Cooperatives

However reluctantly the Federal Security Agency may have reached the result in this case, it recognized that it had to yield to an unmistakable Congressional mandate expressed, to be sure, in tax consequences, but having direct benefit consequences. The scheme of the Act requires that tax and benefit administration be coordinated and that taxes be collectible where benefit coverage is sought. In coordinating the administration of Title II, the agency could not treat Section 209 (1)(4) as a completely isolated provision. It had to consider it in relation to the tax program where decision will not ordinarily be given in favor of the Government, where the legislative history is as clear as it is here, on any rule of liberal construction.

Unquestionably, Congress intended to give tax relief to small growers marketing their fruit through cooperatives. That tax relief could only be granted,

short of destroying the statutory symmetry of the program, by withholding wage credits.

Due to labor conditions, taxes were paid on Baiocchi's wages. But neither the payment of social security taxes nor the employer's willingness to pay is the criterion. The Old Age and Survivors Insurance program can only credit such earnings as constitute wages. *Cf. Punke v. Murphy*, 267 App. Div. 673, 675, 48 N.Y. Supp. (2) 347, 349. The considerations to be applied by the Federal Security Agency are defined in Title II of the Social Security Act. The Bureau of Internal Revenue is not authorized to accept payment with respect to wages not covered by the taxing provisions of the Federal Insurance Contributions Act. C.B. 1937-1, p. 394, S.S.T. 106.⁶ Furthermore, it is not the fact that other cooperatives beside the California Prune and Apricot Growers Association have filed returns covering their processing employees.

D. Wage Credits and Five Quarters of Coverage Have Been Allowed on Account of Work Other than Processing, Such as Maintenance

The referee's opinion carefully states that the deceased wage earner was credited with wages and (five) quarters of coverage for work not directly for the benefit of the growers, such as *maintenance*, when it predominated (R. ⁹⁴; Exhibits D and E in the transcript of the record, numbered pp. 73-78 in the upper right hand corner), in accordance with Section 209(c) of the Act (42 U.S.C. 409(c)); see also *United States v. Colfax Grain Growers, Inc.*, 157 F. (2d) 633 (C.A. 9). The court below seems to have been unaware of this credit when it listed his services as "(1) receiving and grading; (2) processing and packing; (3) shipping;

⁶ Erroneous receipt of payments by government agents cannot enlarge the scope and application of the tax provisions, much less the scope of the benefit provisions. The payments were made voluntarily and without assessment by the Bureau. The remedy for erroneous payments is by claim for refund. 26 U.S.C. 1421.

(4) maintenance.” Processing and marketing (shipping) services in the employ of a cooperative Congress has declared should be regarded as for the account of the growers for purposes of social security taxes. However, wherever it was at all possible in the light of declared Congressional policies to regard the cooperative as an insulator and terminal point for agricultural labor distinct from the farmers, this was done and reflected in the wages credited to deceased wage earner.

E. Within the Framework of the Congressional Definition of “Agricultural Labor,” a Farmers’ Marketing Cooperative Is Not a Market, Much Less a Terminal Market

Although the court below observed that the cooperative “serves as a marketing organization for twenty-eight local non-profit corporations, hereafter called locals, through which individual grower members handle their produce,” it nevertheless concluded, without further discussion, that “decendent worked for a terminal market for distribution for consumption after the dried fruit had reached the grocer’s [sic] or terminal market,” on the assumption that employment in the processing and packaging plant of a cooperative was *identical* for the purposes of the Social Security Act with employment in the plant of a commercial handler. Obviously the court was referring to the *physical operations* and dismissed the different natures of the employers and the different interests of the growers in the fruit as inconsequential. However, “seemingly inconsequential differences often require diverse results,” “not to make subtle or technical distinctions or to deal in legal refinements,” but to respect the legislative policies of Congress. *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285, 295-296. “These agricultural cooperatives are the means by which farmers and stockmen enter into the process-

ing and distribution of their crops and livestock. The distinctions between such cooperatives and business organizations have repeatedly been held to justify different treatment. . . . When proprietary corporations lower sales prices, they naturally seek to lower purchase prices. Their profit depends on spread. On the other hand, the cooperative cannot pass the reduction. All the selling price less expense is available for distribution to its patrons. As its own members bear the burden of price cutting, it was reasonable to exempt it from the payment of the fixed price.” *United States v. Rock Royal Co-Operative*, 307 U.S. 533, 563, *et seq.*⁷

The court below thus overlooked what Congress regarded as fundamental, crucial differences in the relationships between producers and cooperatives and producers and commercial handlers processing commodities for their own accounts. As this court has stated, the producer who markets by sale to a commercial handler has divested himself of all economic interest in his produce. In contrast, the cooperative itself, though a separate legal entity, stands in the position of its producer members, and is not in fact or from the Congressional point of view, as expressed in this legislation, either the producer’s market or the terminal market. It is in recognition of this distinction in relationships, we submit, that the statute designates a “market” as the point between covered employment and “agricultural labor.” Congress not

⁷ The Growers’ Prune Marketing Agreement with the Local (Exhibit K of the transcript, R. ~~178~~) states that the grower recognizes “that the Local has or will become a member of the California Prune and Apricot Growers Association and has or will contract with the California Prune and Apricot Growers Association to deliver all of the prunes handled by it to the California Prune and Apricot Growers Association *for packing and marketing.*” (Italics supplied). The Local-Central Contract (Exhibit L of the transcript, R. ~~179~~) is replete with statements that the purpose was to unite in marketing the growers’ products. The Association’s articles of incorporation (Exhibit U of the transcript) disclose the same purpose, as do its by-laws (Exhibit V of the transcript).

only differentiated cooperatives from commercial handlers, but understood that cooperatives assisted farmers in marketing their crop without constituting journey's end. *United States v. Rock Royal Co-operative*, 307 U. S. 533, 559.

The court below also fell into error in positing that the fruit was ready for market when it was delivered to the cooperative and that the price therefor was then ascertained or ascertainable. These independent findings are contradicted in the record and are refuted by the facts notoriously prevailing in the fruit and vegetable branch of agriculture. The fruit may have been "merchantable" in the terms of the cooperative agreement, *i.e.*, ready for sale in bulk to processors; it was not ready for market any more than uncleaned beans. T. O. Kluge, general manager of the Association, testified (R/48) that the "demand and trade custom at the present time" is that prunes be graded for quality and size, sterilized, and put into consumer packages, before being marketed. These are the processing services performed by the Association. In fact, the fruit is not marketable as turned over to the Association and the price is not fixed. These erroneous findings may account for, or stem from, the court's unrealistic view that a California cooperative marketing association is the grower's market and a terminal market. In any event, it misconceived the functions of a cooperative and the Congressional policies pervading the 1939 expansion of "agricultural labor."

The premise that a California cooperative marketing association is the grower's market and a terminal market is ingenuous but unsound realistically and economically, as Congress well knew when it defined "agricultural labor" in the 1939 amendments to substitute an altogether different view of cooperatives. Admittedly, exclusion from "wages" of the compensa-

tion for services rendered in a city, remote from the farm where the crop was harvested, "as agricultural labor," is anomalous. The operations were performed *under conditions similar to* those in the plant of a commercial handler. However, unlike the *Burger* and *Bettencourt* cases where the packing was done for Rosenberg Bros., one of the world's largest commercial handlers, which purchased fruit outright, the services here were for a farmers' marketing cooperative which cannot be described as a terminal market, or any kind of market. It functions primarily as a marketing agency of the farmers, whose concern over the return on the product is not at an end when the fruit reaches the cooperative for the obvious reason that their worries have just begun. The farmers' returns are not ascertainable until the marketing agency has disposed of the fruit it has to sell for the benefit of the farmers. Gerard C. Henderson, *Cooperative Marketing Associations*, 23 Col. L. Rev. 91, 102-103. Until then the return is subject to all the vagaries and fluctuations of the market, and the grower has not parted "with economic interest in its future form or destiny." *Burger v. Miller*, 66 F. Supp. 619, 626 (S.D. Calif.), affirmed 161 F. (2d) 992 (C.A. 9). This court agreed that Rosenberg Bros. was a market because, and only because, the grower parted with his economic interest in the fruit at the time of delivery. This was the pivotal circumstance. If he had retained such interest, it would have disagreed, for self-evidently its test would not have been satisfied. That the farmers receive advances doesn't mean their price is determined. The advances are only tentative. If they exceed the selling price, the recipients are liable for the difference. *California Raisin Growers v. Abbott*, 160 Cal. 601, 117 Pac. 767; *California Bean Growers Assn. v. Williams*, 82 Cal. App. 434, 255 Pac. 751; *Arkansas Cotton Growers*

Co-op. Assn. v. Brown, 179 Ark. 338, 16 S.W. (2) 177, 178; *Tomlin v. Petty*, 244 Ky. 542, 51 S.W. (2) 663; *Texas Certified Cottonseed Breeders' Assn. v. Aldridge*, 122 Tex. 464, 61 S.W. (2) 79.

The contracts between the growers and the locals on the one hand, and between the locals and the central sales agency on the other are merely parts of an arrangement by which the growers transfer the "title" to the fruit, for marketing purposes, to an association they have organized and that they control. The purpose of the arrangement was to create an agency with absolute power to handle and market the growers' produce without interference by any grower in the manner of handling and marketing "and yet with an ironclad agreement that the agent should have no profit, but account to the grower for the full proceeds of the sale of his property, less the costs and expenses of handling and selling." *City of Owensboro v. Dark Tobacco Growers Assn.*, 222 Ky. 164, 300 S.W. 350, 352.

To function efficiently, to eliminate the possibility of favoritism in marketing, and to insure to each member a fair and equitable share of the proceeds of sale, the central sales agency is empowered to pool and mingle the fruit delivered to it by its members. If it had been intended to vest absolute title to the fruit in the central sales agency, it would have been superfluous to incorporate the provision that it should have the power to borrow money on the security of the prunes sold to it. *Marketing Assn. v. Manning*, 96 Colo. 186, 188, 40 P. (2) 972; *City of Owensboro v. Dark Tobacco Growers Assn.*, 222 Ky. 164, 300 S.W. 350, 352. The provision was not mere surplusage.

Section 1192 of the California Agricultural Code, under which the central sales agency and its locals are organized, provides that such associations are not organized to make profit for themselves or for their

members as such, but only for their members as producers. Their articles of association provide that they are nonprofit and cooperative in character and that each member has an equal proprietary right in their property and assets. Under their by-laws, they may not retain any profits. It is clear, therefore, that they do not handle the fruit of their grower members for their own account.

Even though title may have passed at the time of delivery, still the arrangement is for cooperative marketing. *Rhodes v. Little Falls Dairy Co.*, 230 A.D. 571, 245 N.Y. Supp. 432, 434, affirmed 256 N.Y. 559, 177 N.E. 140. A marketing cooperative is merely the marketing agent of the associated member farmers.

Manifestly, it gets no greater title than is necessary to accomplish its purpose, the power to give a full and unincumbered title, for convenience in financing and in marketing operations. *California & Hawaiian Sugar Refining Corp., Ltd. v. Com'r.*, 163 F. (2d) 531 (C.A. 9), cert. den. 332 U.S. 846; *San Joaquin Valley Poultry Prod. Assn. v. Com'r.*, 136 F. (2d) 382 (C.A. 9); *Bogardus v. Santa Ana Walnut Growers Assn.*, 41 Cal. App. (2) 939, 108 P. (2) 52; *Farmers Cooperative Co. v. Birmingham*, 86 F. Supp. 201, 215-216 (N.D. Iowa); *Bowles v. Inland Empire Dairy Association*, 53 F. Supp. 210, 220 (E.D. Wash.); *City of Owensboro v. Dark Tobacco Growers Assn.*, 222 Ky. 164, 300 S.W. 350; *Texas Certified Cottonseed Breeders' Assn. v. Aldridge*, 122 Tex. 464, 61 S.W. (2) 79, 82-83; *Yakima Fruit Growers Assn. v. Henneford*, 182 Wash. 437, 47 P. (2) 831. It is an agent rather than a "buyer" in any real or statutory sense. *Kansas Wheat Growers' Assn. v. Board of Com'rs*, 119 Kan. 877, 241 Pac. 466, 467. Services for the Association were economically for the account of the grower, although the worker was an employee of the Association,

within the *Burger* test, and were an incident to preparation for market, within the statutory test. Hence its treatment as exempt from income tax under 26 U.S.C. 101 (12). Cooperatives were organized for the purpose of avoiding exploitation by middlemen. *Cooperative Marketing, A Report on the Development and Importance of the Cooperative Movement*, Federal Trade Commission, 70th Cong., 1st Sess., Sen. Doc. No. 95 (Report on Cooperative Marketing of Farm Products), pp. XLII-XLIII.

The central sales agency and its locals handle the fruit of their grower members, not on their own account, but for the account of the grower members. The latter do not part with all or any appreciable economic interest in the fruit, its future form or destiny, when they deliver to the central sales agency or its locals. They retain an equitable interest in the fruit until it is sold by the central sales agency. Thereafter, they have an interest in the proceeds until distribution to them. See cases cited *supra*, p. 43. "The whole conception of the organization was that it was a marketing association created and organized for the purpose of advantageous marketing of the growers' product, not for the benefit of the association, but for the benefit of its members, who were all either growers or landlords." *City of Owensboro v. Dark Tobacco Growers Assn.*, 222 Ky. 164, 300 S.W. 350, 352. ". . . the cooperating members are the real parties in interest in any transaction undertaken by their association." Gerard C. Henderson, *Cooperative Marketing Associations*, 23 Col. L. Rev. 91, 111, quoted with approval in *Tobacco Growers' Coop. Assn. v. Jones*, 185 N.C. 265, 117 S.E. 174, 182.

The legislative history clearly discloses that what the ordinary producer or grower himself does is not the measure of agricultural labor but what he does,

either by himself or through a cooperative or a group. We do not have the benefit of an analysis by the court below but it is apparent that its conclusion loses sight of the main purpose of the amendments, tax relief to the small grower. The "nature of the work modified by the custom of doing it" is no longer a tenable touchstone of coverage if it entails taxes on the processing and shipping employees of a cooperative. As a tax relief measure, Congress exempted services in preparation of fruit for market, regardless of the identity of the employer. Consequently, preoccupation with the activities of the "ordinary" grower or producer instead of with the marketing realities which have impelled the organization of cooperatives defeats the fundamental reason for the amendment. House Report 728, *supra*, p. 17, specifically states, by way of example, that the exception extends to services performed in the sorting or grading of citrus fruits by employees of commercial handlers. We may assume without conceding that only commercial handlers who delayed their purchase of the fruit until the processing was completed were meant, as this court seems to have held in the *Burger* and *Bettencourt* cases, but the significance of the illustration remains. Even the narrower exemption for agricultural commodities generally was "intended to cover all services which are ordinarily performed by the employees of a farmer or by employees of a farmers' cooperative organization or group . . ." (Committee Reports, *supra*, pp. 17, 32). This is an unequivocal declaration that the ordinary grower's activities are not the measure even under the "incident to ordinary farming operations" requirement applicable to commodities other than fruits and vegetables.

Plainly, it was intended that services performed in the handling, processing, etc., of fruits and vege-

within the *Burger* test, and were an incident to preparation for market, within the statutory test. Hence its treatment as exempt from income tax under 26 U.S.C. 101 (12). Cooperatives were organized for the purpose of avoiding exploitation by middlemen. *Cooperative Marketing, A Report on the Development and Importance of the Cooperative Movement*, Federal Trade Commission, 70th Cong., 1st Sess., Sen. Doc. No. 95 (Report on Cooperative Marketing of Farm Products), pp. XLII-XLIII.

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tables constitute agricultural labor, even though they are not ordinarily performed by the employees of a farmer or farmers' cooperative, provided they are rendered as an incident to their preparation for market. Therefore, the place at which they accumulate for distribution into the usual channels of commerce and consumption is the market contemplated by the amendment. For agricultural commodities other than fruits and vegetables, the services must be performed before they reach the market and be for a farmer or farmers' cooperative or group and of a character ordinarily performed by the employees of a farmer or a farmers' cooperative, to come within the exception. Fruit and vegetable processing before the market is reached is excepted even though the fruits and vegetables are not in the form in which they are customarily sold or disposed of by the ordinary producer or grower, and the market is not what has been designated as the grower's market but where the fruits and vegetables accumulate in storage for distribution into the usual channel of commerce and consumption. It is impossible to give the functional integration of cooperative processing due effect if a cooperative marketing association is itself regarded as the market. The relief to small growers would then have been still-born.

While the expression "terminal market" is not defined in the statute or the Committee Reports, it is obviously not the first market. It is commonly used to refer to the point at the end of a rail or truck movement where agricultural commodities are concentrated for distribution to the consumer or one of the great wholesale markets in consumer sections of the country. *Claim of Lazarus*, 268 A.D. 547, 52 N.Y. Supp. (2) 682, affirmed 294 N.Y. 613, 64 N.E. (2) 169; *cf. State ex rel. Beck v. Kansas City*, 148 Kan. 623, 84 P. (2) 409, supp. 149 Kan. 252, 86 P. (2) 476; see authorities collected

pp. 52-53, Appellant's Brief in *Miller v. Burger*, C.A. 9, No. 11480.

In the specialized parlance of marketing, obviously familiar to Congress from its studies of agriculture, there is no support for the contention that Baiocchi's services were rendered after the dried fruit on which he worked had reached "a terminal market for distribution for consumption," and therefore had exceeded the limit set by the last sentence of Section 209(1)(4). No stretch of the phraseology would identify the great railroad terminal market where wholesalers buy at auction for resale to retailers with the position of a farmers' marketing cooperative. All the authorities define a terminal market, in contradistinction to a primary market, as the point—generally at the end of a rail or truck movement—where produce is concentrated for distribution to the consumer. If there were any question of there being several kinds of terminal markets, at the producing region as well as at the end of the rail movement, the phrase "for distribution for consumption" would dispel it for present purposes.

We submit that because of the inherent force of the phrase "terminal market," followed as it is by "distribution for consumption," and because of the manifest legislative intention, the fruit must be held to have reached a terminal market only after it has reached the great wholesale markets in consumers' sections of the country as distinguished from markets in the area of production. (In truck farming, the two tend to merge). The terminal market is the *outside limit* beyond which fruits and vegetables are not processed as an incident to their preparation for market; whatever processing or reprocessing is performed thereafter is in covered employment, even though similar in character to that performed prior to rail movement, and, except for the marketing qualification, otherwise within the definition

of agricultural labor. The Congressional purpose was to lay down on an equal basis at the critical point for price determination—the place of distribution for consumption—all fruit, regardless of whether the grower markets it directly or through a cooperative, without requiring any portion of the crop to be burdened with a tax assessment from which the rest is free.

The Appellate Division of the Supreme Court said in *Claim of Lazarus* (268 A.D. 547, 554, 52 N.Y. Supp. (2) 682, 687):

“The elevator is not a terminal market in the proper sense of the term. A terminal market is the place of business to which products are shipped in a sorted, graded, packaged condition, ready for immediate sale. If the product in the course of shipment, reaches a warehouse in its raw or natural state, or partially sorted, but not yet fully processed and approved for public sale according to law, it is not yet prepared and ready for market; the intermediary warehouse, like the elevator, is not the ‘terminal’ delivery point for such products. After the product has been further completely processed, it is deemed prepared for ‘market’ and then and then only is ready ‘for distribution for consumption.’ ”

If it be considered that the large grocery chains and other retailers or wholesalers to whom the California Prune and Apricot Growers Association sells its finished products are not terminal markets, the conclusion logically to be drawn is not that the point at which such products are being prepared for the growers’ market is the terminal market but that the products are distributed to consumers without ever reaching a terminal market. It is unnecessary to invent terminal markets where Congress has not declared that somewhere along its passage to the consumer fruit necessarily hits a terminal market.

While to be exempt as agricultural labor the services must, under paragraph 1 of Section 209(1), be per-

formed "on a farm," under paragraph (2), "in the employ of the owner or tenant or other operator of the farm," or under paragraph (4), except for fruits and vegetables, "as an incident to ordinary farming operations," with respect to fruits and vegetables no such restrictions are imposed. In processing fruit, the work need not be performed on a farm, in the employ of the operator of the farm, nor as an incident to ordinary farm operations. Congress deliberately dispensed with these requirements for services incident to the preparation of fruits and vegetables for market. In the knowledge of the administrative construction of the 1935 Act classing services performed for cooperative plants as employment, Congress wrote into the amendments a definition removing their employees from the coverage of the Act by adopting as the test the "nature of the work" rather than the character of the employer. It is significant that, since the 1939 amendments, unsuccessful attempts have been made to restore coverage under the Act to employees of the dried fruit packing industry. See H.R. 4018 and H.R. 4175, 78th Cong., 2d Sess. (See also H.R. 169, 80th Cong., 1st Sess., introduced January 3, 1947).

F. Miller v. Burger and Miller v. Bettencourt Are Clearly Distinguishable. North Whittier Heights v. N.L.R.B. Is Inapplicable Where Congress Has Itself Given "Agricultural Labor" an Artificial Statutory Definition Departing from Previous Decisional Law

In the district court in the *Burger* case, Judge Mathes held that Rosenberg Brothers, which purchased from growers fruit which was pitted and dried, stored the fruit and then packed, sold, and delivered it to wholesale and retail outlets as required, was both the terminal market and the growers' market, proceeding on the assumption that "the 'market' Congress meant is the growers' market—the place or point where and the time

when the ordinary producer or grower of the commodity customarily parts with economic interest in its future form or destiny." Up to that time, he reasoned, "services performed by anyone *for the account of the grower or producer* stand exempt from employment taxes as being 'agricultural labor.' Beyond that point—beyond the normal market of the producer or grower—the commodity must bear the burden of the taxes, regardless of who owns it." It may be noted that Judge Goodman in his *Bettencourt* decision rendered the same day declined to determine that Congress when it used the term "market" meant a grower's market, and that this court agreed only in substance. The equivalence robs of meaning the statements in the Committee Reports that what growers do in a group is an incident to ordinary farming operations and that a substantial measure of relief was to be afforded. However, without rearguing the *Burger* case, when legal title passed to Rosenberg Brothers the grower parted with all his economic interest in the fruit, its form or destiny, whereas, we submit, it is stultifying to speak of a cooperative as the grower's market or to suppose that on delivery to the local the grower has parted with economic interest in the future form or destiny of the fruit. The fruit has not been safely marketed when it reaches the cooperative, and the farmer's concern with his product continues. Rosenberg Brothers processed for its sole account fruit grown by others and sold to it as a commercial packer. The sale was complete before the processing was performed. Even if it be true that "growers selling to Rosenberg's Fresno packing plant find that for dried fruit the 'terminal market and the growers' market are one,' " and that "the services of employees like Burger are performed not for the account of any grower, but for the sole account of a commercial handler engaged in the middleman business of

placing the dried fruit in channels of distribution for consumption," every item of the description is at variance with the operations of a marketing cooperative, which is not a market but a step toward the market, which performs processing for the account of its members and at their expense, which operates as a cooperative and not as a commercial handler nor in any middleman business.

A farmer's marketing problem is only just beginning when his products reach the cooperative. It is not a terminal market, and not the grower's market. The events fixing the price will not occur until the cooperative makes the sales arrangements on the basis of which it is determined. The farmer's stake and interest in the disposition of the fruit continues.

This court agreed with Judge Mathes that Rosenberg Brothers' plant was a terminal market and the grower's market, "since this commercial plant was the place where the farmer producer of dried fruit customarily parted with all of his economic interest in the fruit, its future form or destiny." A cooperative is not a commercial plant and the grower has decidedly not parted with all of his "economic interest in the fruit, its future form or destiny." This court further observed that "Rosenberg was a private business corporation organized under the laws of California to conduct a purely commercial operation in the business of buying from farmers and thereafter selling the purchased product for its private profit after processing it. *All aspects of a 'cooperative' venture are missing in the relations of the Rosenberg plant to its employees and the farmer producers from whom it purchased the fruit it processed in its plant.*" (Italics supplied). 161 F. (2d) 992, at 995. The *Bettencourt* case, 161 F. (2d) 995, is inapplicable for the same reasons.

The statement in *North Whittier Heights Citrus Assn. v. National Labor Relations Board*, 109 F. (2d) 76, 80, that "when the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of 'industry' " has been elevated to the status of an eternal invariant verity or judicial absolute instead of a perceptive resolution of the doubtful question whether under the National Labor Relations Act employees of a cooperative processing the fruits of members and nonmembers⁸ were agricultural laborers "where the legislature has given no guides for judgment," *Board v. Hearst Publications*, 322 U.S. 111, 121. This resolution was susceptible of change. See *Waialua Agr. Co. v. Maneja*, 178 F. (2d) 603, 609 (C.A. 9). The *North Whittier* decision was predicated on *whether there was need* for the remedial provisions of the Wagner Act. The court conceded that agriculture and industry were not opposites but laid down the principle that the entry into a factory for processing and marketing confers an industry status. No clearer demonstration could be made of the inappositeness of the *North Whittier* case, for it was stated as a datum that the commodity entered the factory for processing and marketing which most assuredly concedes that the marketing was not accomplished upon receipt at the doors of the plant or even upon completion of the processing. By way of contrast, Section 209(1)(4) excepts services performed as an incident to preparation for market and draws no hard and fast line between what the individual farmer can do for himself and what he can do through a great cooperative selling organization. The basic presuppositions and objectives of the Wagner Act and

⁸ In the *Burger* case, 161 F. (2d) at 994, the North Whittier Association was apparently regarded as a commercial packing house. Unlike the California Prune and Apricot Growers Association, its facilities were available to nonmembers.

the 1939 amendments to the Social Security Act are totally different. The objects of Congressional solicitude in the Wagner Act were the workers, in the 1939 amendments, the small farmer. What this court said in the *North Whittier* case, at p. 79, may be repeated:

“The pursuit of definitions of ‘agricultural laborers’ through the cases leads to confusion because generally the case definitions have grown out of special statutory phraseology or out of judicial effort to conform to legislative intent.”

Moreover, “agricultural laborer” on its face seems inappropriate to describe workers in occupations so integrated with farm activities that “agricultural labor” might cover them.

Properly understood the *North Whittier* case supports the position of appellant. It stands for no such proposition as that a Congressional mandate may be whittled away.

Thus the interpretation of Section 209(1)(4) has been vastly simplified by the events preceding its adoption. It is not comparable to the task of reconstructing presumed motivation faced in *Fosgate Company v. United States*, 125 F. (2d) 775 (C.C.A. 5), cert. den. 317 U.S. 639; *Batt v. United States*, 151 F. (2d) 949 (C.A. 9); *Latimer v. United States*, 52 F. Supp. 228 (S.D. Calif.); or in *North Whittier Heights v. National Labor Relations Board*, *supra*, all presenting the problem of defining the scope of the term “agricultural labor” (or “agricultural laborers”) which was left conveniently *vague* in the spirit of compromise and to leave the thornier, more controversial, questions open. The courts are relieved from looking to the common denominator of *need for benefits* in the absence of clearly defined boundaries established by the legislature or of groping for reasons, such as reporting difficulties of a small farmer using seasonal labor, which are at best con-

jectures. The task here is the simpler and narrower one of applying a specific legislative amplification of that term and of resolving any remaining ambiguities in the light of its purpose and evolution, as shown by the abundant legislative materials available. "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute." *Colgate-Palmolive-Peet Co. v. N. L. R. B.*, 338 U.S. 355, 363.

The previous regulations and judicial definitions sparked a reaction and in 1939 Congress undertook to define the term "agricultural labor" for itself. Its definitions and the regulations issued hereunder control the disposition of this controversy. When the statute contained no definition, the agencies and courts had to formulate their own, having due regard for the legislative objectives. But where a statute defines the meaning of its words, the particularized statutory definition is the point of departure and supersedes inconsistent decisional glosses. Neither definition by the average man nor recourse to customary usage may replace the definition of the lawmakers. *Western Union v. Lenroot*, 323 U.S. 490, 502; *Fox v. Standard Oil Co.*, 294 U.S. 87, 95; *Emery-Bird-Thayer Dry Goods Co. v. Williams*, 98 F. (2d) 166, 170 (C.A. 8); *Von Weise v. Comr.*, 69 F. (2d) 439, 441 (C.A. 8).

In *In re Lazarus*, 294 N.Y. 613, 64 N.E. (2) 169, affirming 268 A.D. 547, 52 N.Y. Supp. (2) 682, and *Michigan Unemployment Compensation Commission v. Unionville Milling Co.*, 313 Mich. 292, 21 N.W. (2) 135, both cases involving changes made in State unemployment compensation acts to bring them into harmony with the Federal act (subchapter C, Chapter 9, of the Internal Revenue Code, 26 U.S.C. 1607(1)(4)), the courts concluded that services performed for commercial bean processors were within the term "agricultural labor" as redefined in the statute. Because

the services in these cases were for the account of the growers, Judge Mathes said in the *Burger* case, 66 F. Supp. 619, 627, that their results were not inconsistent with his own. In bygone days, farmers cleaned their own beans. More recently, the cleaning of beans has been separated from their cultivation. The conclusions of these respected state tribunals are entitled to great respect in view of the close analogy between the dried bean processing and the dried fruit processing. In the *Unionville Milling Company* case, the court attached no importance to the fact that the services of the bean pickers were sometimes rendered after the company had bought the beans.

Here, too, the language of the statute and the regulations is plain and constrains the conclusion that the wage earner's services after December 31, 1939 were excepted agricultural labor.

The evidence before the referee shows that modern merchandising methods and standards have altered the marketing of dried fruit. The consuming public has become more exacting. The cooperative was organized to process fruit and find markets for the farmers. The cooperative cannot be a market or a terminal market fixing prices rather than a point of assembly in the producing region. The cooperative's processing was essential to put the dried fruit in a form acceptable to consumers. It is unacceptable in the form it is purchased from farmers; without the cooperative's services the fruit could not be marketed. Consequently, Baiocchi's services for which wage credits were denied were incidental to the preparation of fruit for market and were properly classified as agricultural labor.

The Michigan and New York courts have rejected the construction urged upon them by the state administrative agencies that "market" in the phrase "incident to the preparation . . . for market" means

the farmer's market and that the market contemplated was the place where the farmer transferred title. If the processor's plant were the market, and services performed thereafter in grading and packing fruits and vegetables were not incident to their preparation for market, the effectiveness and reach of the 1939 amendment would have been cut drastically. The Congressional purpose of assisting the farmer would be frustrated and its policy of exempting the marketing of fruits (because farming is an integrated operation in which the farmer's return—the price in the consumer's wholesale markets less the costs up to that point—was decreased by employment taxes en route to market) would be ignored. The marketing point to which Congress declared it essential to maintain equality was where the farm products in a state acceptable for consumption entered into distribution for consumption. To stop at the point where ordinary farmers have to sell their produce before it is in fact marketable disregards the fact that although anything is marketable at a *distress price*, Congress' point of reference was an active market at destination which does not discount unduly for the state of the produce. It perpetuates the tax inequities which the 1939 amendments were designed to eliminate and substitutes an approach to the small growers' marketing problems in open conflict with the relief Congress afforded.

Nothing turns upon the fact that fruit was dried before reaching the locals, as the courts recognized in the *Burger* and *Bettencourt* cases. It is well settled that administrative regulations are entitled to great weight and, unless contrary to legislative intent, are to be upheld. Cases *supra*, p. 36. And the Committee Reports explaining the 1939 amendments specifically state that the preparation of fruits and vegetables for market, whether perishable or not, is included in the

expanded definition of agricultural labor, regardless of whether performed for a farmer or a farmers' cooperative. The regulations are entirely consistent with the legislative intention and represent a conscientious endeavor to subordinate the Federal Security's Agency's own often expressed views as to the desirable scope of the act to the clearly expressed mandate of Congress.

POINT II

THE ADMINISTRATIVE REGULATIONS OF THE BUREAU OF INTERNAL REVENUE AND THE SOCIAL SECURITY ADMINISTRATION TAKE ACCOUNT OF THE NECESSITY FOR A UNIFORM ADMINISTRATION OF THE TAX AND BENEFIT PROVISIONS OF THE OLD-AGE AND SURVIVORS INSURANCE PROGRAM, EFFECTUATE THE INTENTION OF CONGRESS, ARE REASONABLE, AND SHOULD BE APPLIED

A. The Congressional Policy of Relieving Small Farmers Marketing Their Fruit Through Cooperatives from the Impact of Employment Taxes Is Abundantly Clear and Should Be Effectuated

Congress has shown its special favor for small growers. Its declaration of policy should be carried out. *Wong Yang Sung v. McGrath*, 70 S. Ct. 445, 451-452; *Van Beeck v. Sabine Towing Co.*, 300 U. S. 342, 351; *Johnson v. United States*, 163 Fed. 30, 32 (C.A. 1). Obviously, such partiality for small growers raises no serious constitutional questions. *Steward Machine Co. v. Davis*, 301 U.S. 548, 584-585; *Tigner v. Texas*, 310 U. S. 141, 146; *Detroit Bank v. United States*, 317 U. S. 329, 337; *Dominion Hotel v. Arizona*, 249 U. S. 265; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92; *Florida Fruit & Produce Co. v. United States*, 117 F. (2d) 506 (C. A. 5); cf. *United States v. Colfax Growers, Inc.*, 157 F. (2d) 633 (C. A. 9). Farmers' co-

operatives have long been granted special favored treatment by Congress and the States in taxation and other fields. *Tigner v. Texas*, 310 U. S. 141; *United States v. Rock Royal Co-op*, 307 U. S. 533, 562-3; *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op.*, 276 U. S. 71; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89. The exemption of farmers from the operation of workmen's compensation acts [*New York Central v. White*, 243 U. S. 188; *Ward v. Krinsky*, 259 U. S. 503] and of the fruit harvesting and canning industries from the Women's Night-Hour Law of California [*Miller v. Wilson*, 236 U. S. 373] have been sustained.

In approaching the 1939 amendment, the courts should not be so engrossed in attitudes reflected in decisional law as to neglect and mistake the rationale of the changed legislative policies. The variety of definitions of "agricultural labor" that have gained currency prove that the term is indefinite and that any attempt to apply the term requires an understanding of the statute, its background, purposes, and the administrative consequences of the competing constructions of the new definition.

Under the 1935 Act, Judge McCormick thought his was a "border-line" case, *Latimer v. United States*, 52 F. Supp. 228, 233 (S. D. Calif.) as did the court in *Fosgate v. United States*, 125 F. (2d) 775, 777 (C. A. 5) *cf. Batt v. Unemployment Compensation Division*, 63 Idaho 572, 123 P. (2) 1004; *In re Batt*, 66 Idaho 188, 157 P. (2) 547. See the dissenting opinion in *California Employment Comm. v. Kovacevich*, 27 Cal. (2) 546, 563-4, 165 P. (2) 917, 926-927:

" packing of agricultural products is a farming pursuit. Indeed it must be so characterized in order to fall within the definition of agricultural labor where the employer is an owner or tenant packing as we have seen, by its

very nature, is a part of the farmer's business, otherwise we leave him with his enterprise half completed. He has produced his crops but ceases to have farmer services performed when he carries his project to its logical conclusion—to the end that he had in view when he launched it,—that is, the packing and disposal of the fruits of his toil.”

And in *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92, the Supreme Court said:

“The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production.”

After militant advocacy of an amendment, Congress took steps to except prospectively, from and after December 31, 1939, services in processing performed off the farm and for an employer who was not the owner or tenant of the farm. After study, the Federal Security Agency and the Bureau of Internal Revenue⁹ interpreted the legislative definition in the 1939 amendments to embrace the cleaning, packing, sorting and grading of dried fruits for a farmers' marketing co-operative, recognizing that preconceptions derived from their experience in administering the 1935 Act and judicial interpretations of other social legislation had not been carried over into the amendments but had led to expansion of the agricultural labor exception. That the responsible administrative agencies deferred

⁹ These agencies (or a predecessor) were specifically authorized to publish administrative regulations in the 1935 Act, 42 U.S.C. Sections 1008, 1108, 1302, 49 Stat. 620 at 638, 643, and 647. The 1939 amendments specifically authorized publication of regulations for Title II (42 U.S.C. Section 405(a), 53 Stat. 1368). The Bureau of Internal Revenue has similar authority for the Federal Insurance Contributions Act and Unemployment Tax Act, 26 U.S.C. Sections 1429, 1609, 53 Stat. 178, 183.

to the Congressional policy despite any reservations they may have had as to the soundness of the policy assuredly does not derogate from their rule-making authority. The duty to defer to legislative policies rests on the courts no less than administrative agencies. *Wong Yang Sung v. McGrath*, 70 S. Ct. 445, 452. They too should be sympathetically responsive to changes in Congressional policies, regardless of whether they expand or contract coverage, depart from judicial glosses upon other laws, or reflect debatable assumptions as to tax incidence. "The wisdom of omitting from the coverage of that Act . . . is a matter for the Congress and not for us." *O'Leary v. Social Security Board*, 153 F. (2d) 704, 707 (C. A. 3).

The district court's interpretation affords no relief to the small farmer, minimizes the tax and coordination problems presented by its own construction of Section 209 (1) (4), and fails to realize that in enacting the 1939 amendments Congress regarded processing services ordinarily performed by employees of a farmers' cooperative as an "integral part of farming activities" and "as an incident to ordinary farming operations."

The Federal Security Agency in dealing daily with the old-age and survivors insurance system and processing millions of claims (see Blachly and Oatman, *Judicial Review of Benefactory Action*, 33 Geo. L. J. 1, 12, fn. 53) has acquired a familiarity with the background and objectives of the Act which cannot well be attained by a court in a single contact with a segment of a problem peculiar to the Social Security Act, in most instances under appealing circumstances inimical to the formulation of a workable general rule. If this question had first been presented in a Section 203 (d) (1) (42 U. S. C. 403 (d) (1)) deduction case, the construction urge might have been the other way. The coordinated administration and the contributory

nature of the tax and benefit provisions of the Act, a primary characteristic of the old-age and survivors insurance system, may be seriously disrupted by a court attempting to reach what it considers a desirable result but inevitably lacking the flexibility, power, experience, and resources to recast the regulations so as to achieve a stable nation-wide equilibrium in a complicated field. *Cf. Rottenberg v. United States*, 137 F. (2d) 850, 856 (C. A. 1), affirmed *sub nom. Yakus v. United States*, 321 U. S. 414; *Henderson v. Kimmel*, 47 F. Supp. 635, 645 (D. Kan.).

B. The Canon of Liberal Construction Does Not Justify Resistance to the Intention of Congress to Narrow Coverage

The primary rule of statutory construction is to ascertain and give effect to the will and intent of Congress, *United States v. N. E. Rosenblum Truck Lines*, 315 U. S. 50, 53, as disclosed by the legislative history. *United States v. American Trucking Assns.*, 310 U. S. 534, 543-544. The canon of liberal construction is an auxiliary aid to discovering the intention of Congress in doubtful cases and not to thwart it or stretch coverage beyond the fair intent and purpose. *United States v. Colfax Grain Growers*, 157 F. (2d) 633, 636 (C. A. 9); *Damutz v. Pinchbeck*, 158 F. (2) 882 (C. A. 2). The courts reason from legislative premises, values, and policies and do not speculate as to the probable intent of Congress when its real intent is disclosed. In *Better Business Bureau v. United States*, 326 U. S. 279, 283, in commenting on taxpayer's argument that exemptions under the Social Security tax provisions should be given a liberal construction—the opposite contention to that made by plaintiff—the Supreme Court said:

“Even the most liberal of constructions does not mean that statutory words and phrases are to be

given unusual or tortured meanings unjustified by legislative intent or that express limitations on such an exemption are to be ignored.”

As we have shown, the Congressional intention is not doubtful and cannot be varied by the rule of liberal construction. That rule itself might be applied to enlarge a remedial exception (*McComb v. Hunt Foods, Inc.*, 167 F. (2d) 905, 908 (C. A. 9); *Waialua Agr. Co. v. Maneja*, 178 F. (2d) 603, 609 (C. A. 9)) and does not point unerringly to a decision favoring coverage. The legislative history demonstrates that the tax burden on small farmers was the dominant reason for the broadened 1939 exception as reporting difficulties seem to have been one reason for the 1935 exception. Invocation of the principle of liberal construction is precluded because in Section 209 (1) (4) the special concern of Congress for small farmers prevailed over the normal preference for broader coverage, and it was from the normal preference for coverage that the principle of liberal construction derives such strength as it may have as a guide to presumed intention. The principle of liberal construction is peculiarly delusive when a benefit program is coupled with a tax program as to which the principle is not axiomatic, is somewhat sparingly followed, and has gained only hesitant acceptance. The district court unduly neglected the inquiry whether a tax might be collected from an unwilling cooperative (*cf. United States v. Colfax Grain Growers, Inc.*, 157 F. (2d) 633 (C. A. 9)) when it focused on the desirability of Social Security protection for packing house workers instead of deferring to the purpose of the Act as amplified by its legislative history. It seems impervious and unresponsive for the court in the face of the legislative intent to say in effect that it would require far more direct, explicit, and unequivocal language than Congress has used be-

fore it would be prepared to find a departure from the *North Whittier* approach. The 1939 amendments were a legislative rejection of that approach. *Harrison v. Northern Trust Co.*, 317 U.S. 476. "Precedents are without force when based upon differences and distinctions which have been destroyed by later judicial decision or by statute." *Swift & Co. v. Bankers Trust Co.*, 280 N.Y. 135, 144, 19 N.E. (2) 992, 996.

CONCLUSION

The services were performed for the account of the grower and as an incident to the preparation of the fruit for market. As such they were within the exception and not the coverage. The order appealed from was erroneous and should be reversed, with instructions to the district court to enter judgment affirming the decision of the Federal Security Administrator.

Respectfully submitted,

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APPENDIX

Statutes and Regulations Involved

Title II, Section 205 (g) of the Social Security Act as amended, 53 Stat. 1370, reads as follows:

Any individual, after any final decision of the Board made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia. As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Board or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Board, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations, and the validity of such regulations. The court shall, on motion of the Board, made before it files its answer, remand

the case to the Board for further action by the Board, and may, at any time, on good cause shown, order additional evidence to be taken before the Board, and the Board shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm its findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which its action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

Title II, Sections 209 (a) and (b) of the Social Security Act as amended (42 U. S. C. 409 (a) and (b), 53 Stat. 1373) read in pertinent part as follows:

DEFINITIONS

When used in this title—

(a) The term “wages” means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

(b) The term “employment” means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 (b) of this chapter prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either * * * except—

(1) Agricultural labor (as defined in subsection (1) of this section; * * *

Title II, Section 209 (1) of the Social Security Act as amended (42 U. S. C. 409 (1), 53 Stat. 1377) provides as follows:

(1) The term "agricultural labor" includes all service performed—

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 15 (g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with

commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

Social Security Administration Regulations 3 (Title 20, C. F. R. (1940 Supp.), Part 403, Sec. 403. 808 (e) provides as follows:

(e) *Services described in section 209 (l) (4) of the Act.*—(1) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market of any agricultural or horticultural commodity, other than fruits and vegetables (*see* subparagraph (2) below), produced by such farmer or farmer-members of such organization or group of farmers are excepted, provided such services are performed as an incident to ordinary farming operations.

Generally services are performed "as an incident to ordinary farming operations" within the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by

persons other than such farmer or members of such farmers' organization or group are not performed "as an incident to ordinary farming operations."

(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, provided such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may be excepted whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

(3) The services described in subparagraphs (1) and (2), above, do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover, since the excepted service described in such subparagraphs must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of the commodity, such services do not, for example, include services performed as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities. However, to the extent that the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm, they may be within the provisions of paragraph (c) of this section.

No. **12,496**

In the
United States Circuit Court of Appeals
For the Ninth Circuit

OSCAR R. EWING, Federal Security Ad-
ministrator,

Appellant,

VS.

MARY R. BAIOCCHI,

Appellee.

BRIEF FOR APPELLEE AND APPENDIX

On Appeal from the Order of the United States District
Court for the Northern District of California,
Southern Division.

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No. 12,496

In the

United States Circuit Court of Appeals

For the Ninth Circuit

OSCAR R. EWING, Federal Security Administrator,

Appellant,

vs.

MARY R. BAIOCCHI,

Appellee.

BRIEF FOR APPELLEE AND APPENDIX

On Appeal from the Order of the United States District Court for the Northern District of California, Southern Division.

SUBSTANTIAL AGREEMENT ON FACTS.

The appellee is in substantial agreement with the appellant on the facts as presented in the record and in the appellant's statement of the case.

QUESTION IS ONE OF LAW.

The question before the Court is one of law and on the point at issue, to-wit, whether or not employees of a cooperative commercial packer of dried fruit are entitled to the protection and coverage of the Social Security Act, under the 1939 Amendment thereto,

the appellee is in complete disagreement with the appellant.

HISTORY OF THE CASE.

In fact, the writer of this brief has been litigating the matter of the coverage of dried fruit packing house workers with the Government in the Federal Courts for the last five years and has been at least partially responsible for securing five decisions favoring coverage of all such dried fruit packing house workers from six judges in three test cases brought on behalf of such employees.

These five decisions and the six judges who rendered them are listed, for the convenience of this Court, as follows:

1. *Bettencourt v. Social Security Board*
District Court, Northern District of
California, 1947) 66 Fed. Supp.
629 Goodman
2. *Burger v. Social Security Board*,
(District Court, Southern District of
California, 1947) 66 Fed. Supp 619 Mathes
3. *Miller v. Bettencourt*, Bone
(Circuit Court of Appeals, 9th Circuit Stevens
1947) 161 Fed. (2d) 995 Healy
4. *Miller v. Burger*, Bone
(Circuit Court of Appeals, 9th Circuit, Stevens
1947) 161 Fed. (2nd) 992 Healy
5. *Baiocchi v. Ewing*,
(District Court, Northern District of
California, Dec. 8, 1949), No. 28187H,
87 Fed. Supp. 520 Harris

In all of these cases the writer appeared either as counsel or as *amicus curiae*, being counsel in the *Bettencourt* and *Eaiocchi* cases and appearing as *amicus curiae* in the *Burger* case.

In none of the decisions was anything said which would indicate that the employees of a cooperative commercial packer were to be treated in any manner different from the employees of the ordinary commercial packers who compete with each other in the same industry. It was assumed that they were all to be treated alike, and four of the decisions so indicated directly.

Moreover, the Social Security Administration itself, has repeatedly held that no distinction should be made between these competitive concerns.

We start out with the generalization on February 6, 1945, of Hon. Arthur J. Altmeyer, Chairman, Social Security Agency, approved by Hon. Robert F. Wagner, then U. S. Senator, known as the "Father of Social Security," to the effect that it was, at that time, before any of the above-listed Court decisions were rendered "*by no means certain that dried-fruit workers are now excluded.*" (R. 55, which opinions were, through a printer's error doubtless, not printed in the record, although designated for printing by the U. S. Attorney. See R. 76. For the Court's reference, the letters appear in the Appendix to this brief).

Next we have the decisions of the Appeals Council, Social Security Administration, in the cases of Edgar

T. Penn (554-03-8307) and Marguerite K. Grimley (554-05-7972), decided July 15, 1947, and July 16, 1947, respectively, to the effect that it was "abundantly clear" from the decisions of the Circuit Court of Appeals in the *Bettencourt* and *Burger* cases that the employees of cooperative in the dried fruit packing house field were in covered employment. (R. 104, 168, 169, and Appendix to this brief, pp. xxii, xxvi).

On the basis of these decisions, the Government actually paid benefits for many months to Mr. Penn and Mrs. Grimley, fellow employees of Mr. Baiocchi, based on their earnings from the California Prune and Apricot Growers Association, the cooperative here involved.

When the Commissioner of Internal Revenue refused to go along with the Social Security Administration in its interpretation of this Court's decisions in the *Bettencourt* and *Burger* test cases (in spite of the fact that he had, for 11 long years, collected social security taxes from the cooperative and all its employees, including Penn, Mrs. Grimley and Baiocchi), it was realized that the only way the matter could get into Court again was a denial of benefits in a new test case. So such a new case was brought up by the writer on behalf of Mr. Baiocchi's widow and her two minor children. Mrs. Grimley and Mr. Penn were forced to return the payments they had received to the Government. The bitterness engendered in Edgar Penn's mind thereby undoubtedly contributed to his suicide shortly thereafter. As will be seen, the wel-

fare of thousands of California workers rests upon the decision of this case.

After the *pro forma* decision of the Social Security Administration for the purposes of a test case, an exhaustive hearing was held at San Jose by the Referee. His decision was a formal one, ~~not~~ on the evidence, which was all in favor of coverage, but as follows:

“The Social Security Administration *has determined* that the principles enunciated in the *Burger* case, (*supra*), do not establish a basis for a finding that an individual rendering processing services for a cooperative association is engaged in ‘employment’ within the contemplation of the Social Security Act, as amended. *The position taken by the Administration* is to the effect that . . .” (Emphasis added). (R. 100).

When the learned Judge Harris approved the Administration’s original decision to the effect that it was “abundantly clear” that the more than 2,000 employees involved were covered, it was felt that this decision would surely end the five years of litigation of this matter. The Commissioner of Internal Revenue, however, insisted on an appeal. The Social Security Administration and its Commissioner, Hon. Arthur J. Altmeyer, have expressed themselves to the effect that the Federal Security Agency would recommend to the Department of Justice that this appeal be dismissed if the Bureau of Internal Revenue would acquiesce in the decision. Hon. Alanson W. Willcox, General Counsel for the Federal Security Agency, also so advised the

writer of this brief. The Bureau of Internal Revenue would not acquiesce however and the Attorney General, therefore, felt duty bound to present the matter to this Honorable Court, doubtless to obtain a more authoritative decision than a District Court decision pertaining solely to the employees of a cooperative.

THE MERITS OF THE CASE.

From reading the appellant's brief one would hardly get the idea that the above true facts prevail. Written in Washington, doubtless by exponents of those who originally were responsible for the Internal Revenue Bureau's rulings which this Honorable Court set aside in the *Bettencourt* and *Burger* cases, the brief constitutes either a confused distortion of the entire situation or shows a cold-hearted desire to sacrifice human rights (paid for in this case) on the altar of subtle, technical distinctions and legal refinements. Occasionally, however, even the appellant must concede the impossibility of his position. (See p. 20, where appellant says his position is anomalous).

POINT I.

LEGISLATIVE INTENT.

Harking back to the legislative intent, which four Federal Courts have already construed contrary to the appellant in the five decisions listed above, the writers of the appellant's brief seek to give the impression that Congress intended to restrict coverage

of the Social Security Act by the 1939 Amendment here in question. This is positively not the case. There was no such desire whatsoever. The whole history of the legislation as set forth in the Appendix hereto shows this conclusively. The desire was to supplement, improve and increase coverage.

The writer of this brief happened to have been in Washington at the time the 1939 Amendment was passed. In fact, he was there for seven years from 1936 to 1943, directing the activities of a Steering Committee of 150 Congressmen interested in the extension of the coverage of the Social Security Act, attended every session of the hearings of the House Ways and Means Committee during the two months it considered the various 1939 Amendments, and testified for three days before the House Committee and before the Senate Finance Committee, heard all the debates there and on the floor of the House and Senate.

Not once during this whole period was there any mention made of the possibility that commercial packing house workers, even those employed by the co-operatives in this field, might be considered excluded. Had there been, the matter would certainly have caused extensive debate and opposition from the members of the Steering Committee with which the writer of this brief was working.

As it was, the main phrase which the Congressmen used in connection with the Amendment and which stood out in the minds of all was the phrase, "*as such*

services are an integral part of farming activities." The appellant's own brief, on page 16, cites this basic test for "agricultural work" in the Committee Report which he quotes. It cites further, on pages 16 and 17, another Committee Report to the effect that the same rule applies to a "farmer, a farmers' cooperative, or a commercial handler of such commodities," which rule, as set forth by Congressman Buck on page 30 of appellant's brief, is "*the nature of the work and not by whom the man is employed.*" (See Appendix of this brief for more detailed excerpts from Congressman Buck's speech).

If these basic rules, set forth in the appellant's own brief, are thoroughly understood, there should be no difficulty about this case.

The main difficulty which the Government has faced in dealing with this problem has been the early fundamental error of the Bureau of Internal Revenue of attempting to apply to dried fruit packing house workers the *general* test for agricultural commodities found in Paragraph (4), to wit, the test of whether or not the work was "incident to ordinary farming operations," applicable, for instance, to grain cases, instead of the two specific statutory tests found in the last part of this paragraph for "fruits and vegetables," to-wit (1) whether or not the work was incident to the preparation of such fruits or vegetables for *market* or (2) whether or not the work was performed after delivery "to a *terminal market* for distribution for consumption."

Even under the "incident to ordinary farming operations," rule the Bureau of Internal Revenue could not, in fact, justify its position, but it has stuck to it stubbornly through ten years of intra-departmental squabbles with the Social Security Administration and five years of Federal Court litigation with the writer in which the Bureau has gained no solace from any of the five decisions rendered. To completely ignore the two specific statutory tests for employees working with "fruits and vegetables," under these circumstances, especially when the second highest Court in the land has ordered them applied, is unbecoming of a Federal agency which is part of an ordinarily humane government. Yet here we are in that same high Court for the second time on the same issue, to-wit, whether or not these two basic tests must be applied to *all* workers in the same field when the statute says they must be so applied.

POINT II.

THE DECISION THAT THE DECEASED'S SERVICES WERE AGRICULTURAL LABOR BY THE ADMINISTRATOR WAS ERROR AS A MATTER OF LAW AND PROPERLY REVERSED BY THE DISTRICT COURT.

The decision of the lower Court granting the motion for a summary judgment and reversing the appellant's decision as a matter of law was correct.

As it has already been pointed out, the appellant

has seriously confused and misapplied the legislative history and intent of the 1939 amendment and definition of "agricultural labor." In spite of all of the express legislative history, of committee report after committee report, of the statute itself, and of the regulations thereunder, which point to the simple fact that the test is the "nature of the work and not by whom the man is employed," (see appellant's brief at page 15), the appellant devotes almost all of the argument to trying to destroy this simple test set forth by him. For example, the appellant argues that the case of *Miller v. Burger*, 161 F. (2d) 992 (9th Cir.), and the companion case of *Miller v. Bettencourt*, 161 F. (2d) 995 (9th Cir.) are distinguishable from the case at the bar because the California Prune and Apricot Growers Association here involved is a non-profit corporation and because Rosenberg Bros. involved in the *Burger* and *Bettencourt* cases was a profit organization.

If, as the appellant argues in the first half of his brief, the test of "agricultural labor" as defined in the act is the "*nature of the work and not by whom the man is employed*," why do we look to see by whom the man is employed—cooperative or profit corporation? It is this confusion that has kept the appellant vacillating for eleven years from the extremes of coverages to non-coverage.

Since the appellant claims the test is the "*nature of the work and not by whom the man is employed*," let us apply that simple test as stated by Congress-

man Buck, the legislative reports, the statute and the *Burger* and *Bettencourt* Court cases.

The Referee who heard the matter and decided it, stated in his opinion (R. 99):

“From the evidence in this record it appears that the association performs its functions and handles its produce substantially identical to the manner and methods utilized by Rosenberg Brothers, a commercial packer. Rosenberg Brothers was the employer involved in the case of *Miller v. Burger*, 161 Fed. 2d. 992, in which case it was held that a processor of dried fruit was not engaged in agricultural labor.”

If this is so, and there is no dispute, *if the nature of the work is identical*, then the result must be identical. If Burger, in the *Burger* case, did the same kind of work as Baiocchi did in the case at bar and the nature of the work is the test of coverage, then clearly, Baiocchi performed services in covered employment within the meaning of the act.

Another clear inconsistency in the appellant's argument is his assertion that the definition of “agricultural labor” was enacted to relieve the member of a cooperative non-profit corporation of the tax burden which allegedly was not placed on the large farmer. To state that any large farmer in the State of California performs any of the functions of the California Prune and Apricot Growers Association is to make a statement in derogation of the record. (See R. 96). Apparently, the stockholders of the twenty-eight non-profit corporations that control the California Prune

and Apricot Growers Association are not worried about any tax exemption since the corporation, as a matter of record, has contributed since 1936. The amazing thing about this alleged intent, as appellant applies it, is that instead of preventing inequality of tax burden by the appellant's position, he is creating a new type of inequality, namely, between the small farmer who sells to the cooperative non-profit corporation, such as the California Prune and Apricot Growers Association, and the small farmer who sells to the profit corporation, such as Rosenberg Bros. This apparently is of no concern to the appellant as he blandly argues for equality of tax burden or else he deliberately ignores it. Whether tax equality for activities of cooperatives was intended becomes less certain when we realize that all of the secretarial and clerical help for this cooperative is covered and also that, even in the case at bar, the deceased was credited for five quarters of coverage after 1939, when working for this cooperative performing maintenance work. If Congressional intent was to relieve members of cooperatives of any tax burden, as appellant states, why were they not given a blanket exemption for all employees of the cooperative? The fact is that Congress considered exempting cooperatives as such in 1939 and decided against it, exempting only such employees as earned less than \$45.00 a quarter (42 USC 409 (b) (10) A (i)). Thus we return again to the true congressional intent, namely, to make the test *the nature of the work* and *not* by whom the worker

is employed. This point, however, does show the inevitable inequality that results when we apply that rule to the profit corporation and refuse to apply it to the non-profit corporation.

The appellant's position in this matter is not only in violation of the intent of Congressman Buck, the legislative reports and the statute, but also in violation of the leading and recent *Burger* and *Bettencourt* cases, *supra*.

It is the appellee's contention that the *Burger* and *Bettencourt* cases establish that the employees of a terminal market or of a growers' market are not in agricultural labor, but are performing services within covered "employment" under the Social Security Act, as amended, regardless of the business structure of the organization that is the "market" or "terminal market." This used to be the Administration's attitude, also. (See attached Appendix, p. xix, for ruling before 1940 that the workers are employed by the Association and *not* by the producer members thereof, a ruling in which the *Bureau of Internal Revenue* acquiesced *at that time*. See, also, Appendix, pp. xxii-xxvi, for rulings in *Penn* and *Grimley* cases).

This is the square holding in the *Burger* case, in 66 Fed. Supp. 619 at p. 624, wherein Judge Mathes held:

"Services performed in treating and handling an agricultural commodity after delivery to a terminal market for distribution for consumption unquestionably do not constitute an integral part of farming activities. And it is clear from the last sentence of paragraph (4) of the legislative

definition that Congress did not intend to exempt such services as agricultural labor, *even when performed for the account of the producer or grower*" (Emphasis added).

"This legislative intent is unambiguously expressed.

"Delivery to a terminal market for distribution for consumption is fixed by statute as a definitive boundary. Thus Congress has drawn a line of demarcation across the various pathways followed by agricultural and horticultural commodities in passing from producer to consumer, and has declared that once the commodity reaches the market, from which in ordinary course of trade it next goes into the channels of distribution, any service afterwards performed for any person in treating or handling such commodity does not constitute 'agricultural labor' within the meaning of the act."

The *Burger* case was affirmed on appeal by the Ninth Circuit on June 5, 1947, in 161 F. 2d 992 and is the law of this circuit.

The *Burger* case also establishes the rule without question that by the term "market," Congress means the grower's market. Up until the "grower's market" is reached, services performed by anyone or any type of business association for the account of the grower or producer is exempt as being "agricultural labor." But as is stated in the *Burger* case, 66 F. Supp. 619 at p. 626:

"Beyond that point—beyond the normal market of the producer or grower—the commodity must bear the burden of the taxes *regardless of who owns it.*" (Emphasis added).

There could be no clearer exposition of the law.

The companion case of *Bettencourt v. Social Security Board*, 66 Fed. Supp. 629, was similarly treated except that Judge Goodman did not feel it essential to determine that the word "market" as used in 42 U. S. C. A. 409 (1) meant "grower's market."

Both the *Burger* and *Bettencourt* cases were appealed by the Social Security Administration and were affirmed in 161 F. 2d. 992, and 161 F. 2nd 995, respectively. In the *Burger* case, Judge Bone, speaking for the Court, held that the Rosenberg Bros. plant was a "terminal market" and a "market" (held to properly mean a "grower's market") and the decision of Judge Mathes was affirmed. The *Bettencourt* case was, likewise, affirmed.

One of the findings of fact by the referee in the case at bar was that the Central Sales Agency operated in an identical manner to the Rosenberg Bros. plant. The conclusion is thus inescapable that the administration's decision is wrong as a matter of law and must be reversed.

The fact that Baiocchi worked for a non-profit corporation and Burger worked for a profit corporation is unimportant as is seen in many cases, one of the clearest of which is the recent decision of *California Employment Commission v. Butte County etc. Assn.*, 25 Cal. 2d 624, 154 P. 2d 892. Speaking of a corporation organized under the same law as the Central Sales Agency and Locals involved therein, the Court therein at p. 636 and 637 said:

“The nature of the defendant’s corporate structure is immaterial for ‘cooperative corporations are just as distinct an entity as are other private corporations.’ (*Fletcher’s Cyclopedia of Corporations* (perm. ed.) Vol. 1 No. 25, p. 90). The doctrine of separate entity will be disregarded only to prevent fraud or grave injustice * * * Obviously no such reason exists here for ignoring the plain language of the effective administrative definition—but, on the contrary, to treat the defendant corporation nevertheless as the *alter ego* of the individual farmer members *would, in fact, promote injustice* by unnecessarily restricting the operative scope of the unemployment law of this state, a limitation wholly out of line with the beneficial purpose of such legislation that, consistent with its terms, the coverage provisions have a broad application.” (Emphasis by Court).

See also in this respect

Cowiche Growers, Inc. v. Bates (1941), 10 Wn. 2d. 585, 117 P. 2d, 624;

Employment Security Commission v. Arizona Citrus Growers (1944), 61 Ariz. 96, 144 P. 2d 682;

H. Duys and Co. v. Tone, 125 Conn. 500, 5A. 2d. 23;

Maryland and Virginia Milk Producers Assn. Inc. v. District of Columbia, 73 App. D. C. 399, 119 F. 2d. 787.

Actually, the fact that Baiocchi worked for a non-profit corporation makes the case even stronger than if he had worked for a profit corporation.

Look to the plain words of the statute. Employment is defined in Section 209 (b) broadly as all services, of whatever nature. There are definite exceptions,

however. Exception 10 (B) of Section 209 (b) excepts service performed in employ of an agricultural organization exempt under 101 (1) of the I. R. C. That that is not this case is shown by T. D. Reg. 111-Sec. 29 101 (1)-1 which explains that exception as applying to organizations which “(1) Have no net income inuring to the benefit of any member; (2) Are educational or instructive in character; and * * *”

That is obviously not the Central Sales Agency. It does have “net income inuring to the benefit of” all of its members and isn’t educational or instructive in character. (R. 166).

The Central Sales Agency, however, is excepted by sub-section 10 (A) of Section 209 (b) of the Social Security Act as to services not exceeding \$45.00 per quarter. It is exempt from corporate income taxation and has been granted an exemption under the provisions of Internal Revenue Code 101 (12) (See R. 166). The statute, Section 209 (b) 10 (A) (Social Security Act) is plain that employment, as defined therein, includes services rendered a corporation exempt under any subsection of I. R. C. 101 (except I. R. C. 101 (1)) if the remuneration exceeds \$45.00 per quarter.

The wording of the amendment to the Social Security Act in 1939 is plain. “Farmers, fruit growers, or other like associations organized and operated (a) for the purpose of marketing the products of their members or other producers” (I. R. C. 101 (12)) employing workers who earn wages in excess of

\$45.00 are thus employing employees earning wages in covered employment, within the definition of the Social Security Act. The plain words of this 1939 amendment to 209 (b) show conclusively without doubt that the meaning of the 1939 amendment to 209 (b) was as interpreted in the *Burger* and *Betten-court* cases and that the widow of Almando Baiocchi and his minor children are entitled to their benefits under the Social Security as a matter of law. The position of the Social Security Administration is absolutely without support and not only is wrong as a matter of law, but also has been manifestly unjust to her, in that she, Mrs. Baiocchi, a widow, has been compelled to wait over a period of three and one-half years for her benefits and for the benefits of her children and obtain the services of counsel to sue and to defend an appeal in this Court for benefits that are hers unquestionably, as a matter of law.

The appellant, in his specification of errors, No. 8, complains that the District Court erred in disregarding the appellant's finding and finding independently and without support in the record that when the locals turned dried fruit over to the California Prune and Apricot Growers Association it is in merchantable state, and payment of the purchase price is then fixed, although postponed. With respect to this complaint, we need only to refer to the opinion of the Referee which appears on page 98 of the Transcript of Record. The Referee's opinion at page 98 states:

“No dehydration process whatsoever is performed by the Association. When the produce is brought by the grower in dehydrated form to the Association and after it has been weighed, it is first tested to determine its perishability. If the produce does not meet the standards of the Association in this regard, it is rejected by the Association. Upon acceptance by the Association it is placed in bins after it has been graded and remains in those bins until it is ready to be packed. Before packing the produce is sterilized and with the exception of the actual packing operation that is the only process performed on the fruit by the Association.”

Also of interest in this respect is page 178 through 180 of the Transcript of Record, paragraph 3 (d), as it appears at page 178, requires all prunes to be delivered in a properly dried and merchantable condition.

Paragraph 3, as it appears at page 179, requires any local delivering to the California Prune and Apricot Growers Association to deliver the dried fruits in a properly dried and merchantable condition. Since this specification of alleged error is so clearly wrong and the finding by the District Court is sustained by the opinion of the Referee and the Transcript in question, and further, since the appellant does not attempt to develop in his argument this specification of error whatsoever, it is felt that no further treatment of this specification is necessary.

As to the claim that the purchase price is not fixed, the opinion of the Referee (See R. 96-97) clearly re-

futes any such claim, as does the testimony on the original hearing as set out at pages 153 and 154 of the Transcript of Record. Since this specification is also abandoned by the appellant and not argued, it is felt that no further authority is needed.

In specification of error No. 11, the appellant asserts that the District Court should have found that the California Prune & Apricot Growers Association was an agent rather than buyer, and that all of its services were for the account of the growers. The statement that the California Prune & Apricot Growers Association is an agent or trustee of the members of its local non-profit corporations is about as accurate as to state that legally a bailee is a trustee for the bailor, a creditor is an agent of the debtor, or a person with a power of appointment is an agent of the beneficiary.

The writer of this brief has no quarrel with the statement that a fiduciary relation exists *which requires the association to account to grower members for the proceeds* received by it for the sale of fruit delivered to it, but it is certainly not an agent or trustee for them *in any respect at all*. Does the grower have the power to *control* the detailed operation of the association? Does the grower have the *power of termination* of the agency? Does the Association contract as agent for its members? Can an agent sue its principal for liquidated damages, an injunction or specific performance? The answer is, of course, nega-

tive in all of these respects. Where then are the attributes of an agency?

The appellant must be aware of the basic facts of cooperative marketing. See, for example, 15 Cal. L. Rev., at p. 88, in which it is stated:

“The marketing agreements of co-operative marketing associations are of two general types, the agency type and the purchase and sale type . . . By the purchase and sale type of contract the grower agrees to sell and the association to buy the grower’s crop. This type of contract constitutes an executory agreement for the sale of the crop to the association⁶, and title of the crop passes to the association upon delivery, unless otherwise provided⁷.”

See, also, the *Law of Cooperative Marketing*, Evans and Stokdyk, 1937, Lawyers Coop. Publ. Company, at p. 145, in which it is said:

“An examination of marketing contracts in use in various jurisdictions will disclose many points of resemblance. In one particular, however, namely in the selection of terms to express the covenant by which the member agrees to market his product through the association, two distinct formulas are noticeable—one, ‘The grower hereby appoints the association his sole agent,’ the other, ‘The association agrees to purchase and the grower agrees to sell and deliver,’ or ‘The association buys and the grower sells and agrees to deliver’.”

The Transcript of Record at page 178 and page 179 reads respectively as follows:

“Local agrees to buy and the Grower agrees to sell and deliver to the Local . . .” (R., p. 178).

"The Central Sales Agency agrees to buy and the Local agrees to sell and deliver to the Central Sales Agency . . ." (R., p. 179).

How then can the defendant advise this Honorable Court that under the law the relationship between Association and the member of a local is one of principal-agent or trustee-beneficiary? There is obviously a sale and transfer of absolute title.

There is no dispute that the California Prune & Apricot Growers Association has absolute title to the fruit, can dispose of it as it wishes, can mortgage it, can commingle it, and that the risk of loss is on the California Prune & Apricot Growers Association and not on the grower of the particular fruit which might be destroyed. What other attributes of legal ownership are there? The appellant is in error when he states the California Prune & Apricot Growers Association holds only naked legal title as an agent or trustee.

The appellant, however, seems to abandon this specification of error in that in his argument he does not devote any substantial space to an assertion that this non-profit corporation, the California Prune & Apricot Growers Association, being a corporation twice removed from the grower, is an agent or does work as an agent for the account of the grower. Clearly, to do so would be to defy established rules of corporation law with respect to corporation identity and the established law of this Circuit with respect to preserving the corporation identity in such a situation.

There is no conflict of fact in the case at bar. The facts are clear and obvious and are as reported by the referee. There is no controversy of mixed law and fact. The whole case rests upon a question of law; namely, whether the deceased employee, Almando Baiocchi, performed "agricultural labor" within the meaning of the Act as quoted heretofore. This, it is submitted, is a pure question of law which must be determined by this Honorable Court.

In *Carroll v. Social Security Board*, 148 F. 2d 679, the Seventh Circuit, when faced with a similar problem, commented:

"Moreover in our view, the rule (that the Court is bound by the findings of the Board) has no application, because the question presents an issue of law rather than fact. It involves a construction of the act."

In such a manner, Circuit Judge Bone of the Ninth Circuit, also, in an identical case to the case at bar, commented in the case of *Miller v. Burger, supra*:

"While the findings of fact of the Social Security Board are supported by the evidence, we think its decision was incorrect when measured off against the language of the Act and the intent of Congress in adopting the 1939 amendment thereto. The District Court was justified in reversing the decision of the Board . . ."

In the sister case of *Miller v. Bettencourt, supra*, the same Judge commented at p. 996:

"This being true, as a matter of law, the labor of appellee in the Rosenberg plant was not 'agricultural labor' . . ."

for consumption, the statute states that the services of workers thereafter are in covered employment regardless of who owns the product, be he one farmer, two farmers in a partnership, or five thousand farmers owning stock in either a profit or a non-profit marketing corporation.

As is stated in the *Burger* case, 66 F. Supp. 619 at p. 626:

“Beyond that point—beyond the normal market of the producer or grower—the commodity must bear the burden of the taxes *regardless of who owns it.*” (Emphasis added).

Clearly, the authorities set out herein above show that we do not pierce the corporate fiction of a non-profit corporation any more than that of a profit corporation in the absence of traditional rules with respect to fraud; but, even if we did, the *Burger* case, *supra*, and the legislative intent as declared by appellant would compel the same result, namely, coverage for the deceased and affirmance of the lower Court.

What then is the appellant attempting to do? Is he attempting to overrule the *Burger* case, *supra*, by reading “cooperative” into the statute? The word “cooperatives” is not once used in Title II of the Social Security Act (except by indirect reference to the I. R. C.). It is not even mentioned in 42 U. S. C. A. 409 (1), the section which defines “agricultural labor.” Is the Administration attempting to legislate a new exception to coverage under the Social Security Act?

Neither Congress nor the Courts have ever attempted to distinguish between work rendered for corporations (profit or non-profit) in defining agricultural labor. The test of "agricultural labor" has always been to the legislature, judiciary, and citizenry a question of the type of work done.

Since the nature of the work is the same in the case at bar as in the *Burger* and *Bettencourt* cases, and the chain of commerce identical between grower and consumer, how can the appellant justify his position? The commercial plants being almost identical and the nature of the work the same, how can the appellant justify his position and this appeal? He attempts to do so by the mere assertion that a cooperative non-profit organization cannot be a market, neither a "grower's" market or a terminal market for distribution for consumption and, as for the latter, he suggests that we do not have to have one. This argument blindly ignores the facts and the law of the situation.

The facts are that each grower has a contract with a Local non-profit corporation and that each of the twenty-eight Locals has a contract with the Central Sales Agency, the California Prune & Apricot Growers Association, which contract provides for liquidated damages and which, under the law of this state, may be enforced by injunction or specific performance. Dried fruit is produced by the farmers who grow it. The farmer picks the fruit, sulphurs it, dries or dehydrates it or hires others to perform the above ser-

vices and then delivers it in the dried manufactured form to the growers' market, which in this case is the Central Sales Agency. The dried fruit is transported to the Local by the grower and there title passes to the Local if the goods are in a deliverable state and are accepted by it. The fruit may be and is commingled, after grading, with that of other members. The loss or destruction of the goods would fall upon the corporation that held title at the time of loss. The corporation, Local or Central Sales Agency, in whom title is vested, has an insurable interest and insures the product. The corporation, Local or Central, can pledge, borrow money, or issue warehouse receipts on the dried fruit and at times has.

When the Local turns the dried fruit over to the Central Sales Agency in a merchantable state, after the latter's acceptance, title passes from the Local to the Central. Complete payment of the purchase price is postponed, but it is fixed and the Central is subject to the Locals to account according to the contract, by-laws and statutes. The Central must render bookkeeping services for the Local. There is then a sale and a market.

By illustration, if a fire destroys all of the specific prunes of a grower after delivery to a Local or the Central, the grower suffers no loss at all, but receives his regular profits. He could not reclaim his prunes after delivery if he desires. He has no control as to how they are packed, where they are shipped, when they are sold or to whom they are sold. His only in-

terest is in the receipt of the sales price in accordance with the sales contract. He cannot hire or fire any employee or direct their work in any particular. He was as remote to the deceased Baiocchi as a New York resident owning stock in Rosenberg Bros. would be to Burger or Bettencourt. He does not know the work and cannot do the work. The grower is a stranger.

The California Prune and Apricot Growers Association is his *market*. Upon the delivery of the dried manufactured prunes to the Local in a merchantable state by rail or truck, as he is required to do under his marketing contract, his farming activities are over. A highly industrial type of commercial activity then begins in which 1500 workers participate. The grower's market has been reached. He has sold his product. Unless *this* is the grower's market, where is it? Is it the retail chain store that next receive some of his prunes in a box commingled beyond recognition with the prunes of others? To say that that is when the ordinary prune grower customarily parts with his economic interest in the future form or destiny of his prunes flies in the face of reality. Nor can you say that that retail chain store is the terminal market for distribution for consumption since that phrase is clearly defined in the *Burger* case, 66 F. Supp. at p. 624, wherein it is said:

“ ‘Delivery to a terminal market for distribution for consumption’ is fixed by statute as a definitive boundary. Thus, Congress has drawn a line of demarcation across the various pathways followed by agricultural and horticultural commo-

dities in passing from producer to consumer, and has declared that once the commodity reaches the *market, from which in ordinary course of trade it next goes into the channels of distribution for consumption*, any service afterwards performed for any person in treating or handling such commodity does not constitute 'agricultural labor' within the meaning of the Act.

"The uncontradicted evidence presented to the Board discloses that along the producer-to-consume route of dried fruit the Fresno packing plant is a terminal market. The company packs, sells, and delivers it to wholesale and retail outlets. Burger's services were the beginning step in the Rosenberg process of preparing dried fruit for 'distribution for consumption'." (Emphasis added).

Under this definition, clearly the cooperative non-profit corporation here involved is the "market, from which in ordinary course of trade it next goes into the channels of distribution for consumption." If so, it is a terminal market in spite of appellant's desire to ignore the Court's definition of the term. Moreover, the appellant, in addition to ignoring this Court's decisions and congressional intent, suggests on page 48 of his brief that this Court ignore the plain words of the statute and hold that there is no terminal market for distribution to consumption where there is a cooperative. Thus, by a process of administrative legislation, appellant attempts to repeal the express words of the statute, by blindly ignoring them, and overrule the judicial definition of the term terminal market as contained in the *Burger* case as quoted above and as the law of this Circuit.

POINT III.

AN INTERPRETATION EXCLUDING THE DRIED FRUIT EMPLOYEES OF COOPERATIVES AND INCLUDING THE EMPLOYEES OF A COMMERCIAL PACKER WOULD MAKE THAT SECTION OF THE ACT UNCONSTITUTIONAL.

The chief reason for excepting agricultural labor from social security coverage and other allied remedial legislation has been administrative and accounting problems. No such problems exist in the dried fruit packing house, whether commercial or cooperative. The Central Sales Agency, in question, has a large accounting force and under its contracts renders accounting services for its member corporations. It employs as high as 1500 workers. It is a modern, efficient sales organization competing against other corporations on the open market in a highly competitive business. Moreover, there is no difficulty of collection. As a matter of fact, the money, both taxes and contributions, have been for thirteen and one-half years and are now being paid to the Treasury Department.

In this respect, the California Supreme Court in *Cal. Emp. Com. v. Butte County etc. Assn., supra*, quoting almost verbatim from *Latimer v. U. S.*, 52 F. Supp. 228 (S. D., Calif.) at p. 231, commented:

“Second, the principal reason for exempting ‘agricultural labor’ from social and industrial benefits resulting from remedial legislation has been administrative difficulties and accounting inconveniences in farm work (*Carmichael v. Southern*

Coal and C. Co., 301 U. S. 495 (57 S. Ct. 868, 81 L. Ed. 1245, 109 A. L. R. 1327)), but with relation to employment in and operation and management of packing houses by respective associations, no such practical impediment exists. On the contrary, the usual economy, efficiency and skill with which such associations units, functioning as adjuncts to agricultural pursuits, are operated by boards of directors and expert business managers, complemented by systematic office service, place them on no different level than other business enterprises insofar as concerns ability to comply with administrative computation procedure under unemployment compensation insurance laws."

The corporation the Court was there discussing was incorporated under the identical statute as are the corporations, Central and Local, in the case at bar.

As was pointed out in the *Burger* case, *supra*, at p. 627, by Judge Mathes:

"Likewise, here as the record clearly reveals the very factors which have been relied upon as constitutional justification for the 'agricultural labor' exemptions are entirely wanting. *Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495 * * *"

A fortiori, that is the case here where the packer is a corporation fully as large as the Rosenberg Bros. corporation.

A physical distinction between the two corporations is impossible. They both perform identical services, employ the same type of labor to do the same type of work, and have large accounting and clerical staffs.

To deny Social Security benefits to the employees of one and to grant them to the employees of the other would be arbitrary, capricious, legislation and classification in derogation of due process of law guaranteed to all persons by the fifth amendment.

In this respect, counsel wishes to point to the following authorities:

Leeper v. Texas, 139 U. S. 462, Sup Ct. 277;
Giozza v. Tierman, 148 U. S. 657, 12 Sup. Ct. 721;
U. S. v. Yount, D. C., 267 Fed. 861;
Steward Machine Co. v. Davis, 301 U. S. 548, 83 L. Ed. 441;
U. S. v. Armstrong, D. C., 265 Fed. 683;
U. S. v. New York etc. Co., 165 Fed. 742;
Sims v. Rives, 66 App. C. 24, 84 Fed. 871, cert. denied, 298 U. S. 682, 56 S. Ct. 960, 80 L. Ed. 1402;
Lappin v. D. of Col., 22 App. D. C. 68.

As is stated in 11 *Am. Jr.* 96 at p. 725:

“It is an elementary principle that when the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the Court should adopt the construction that would uphold it¹⁰.”

Cited as the leading cases in this respect are the following cases:

Chippewa Indians v. United States, 301 U. S. 358, 81 L. Ed. 1156, 57 S. Ct. 826;
Anniston Mfg. Co. v. Davis, 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816;
Crowell v. Benson, 285 U. S. 22, 76 L. Ed. 596, 52 S. Ct. 285;

United States v. La Franca, 282 U. S. 568, 75 L. Ed. 551, 51 S. Ct. 278;
Reiniche v. Northern Trust Co., 278 U. S. 339, 73 L. Ed. 410, 49 S. Ct. 123;
Hooper v. Calif., 155 U. S. 648, 39 L. Ed. 297, 15 S. Ct. 207;
United States v. Howell, 11 Wall 432, 20 L. Ed. 195
Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732.

It is, therefore, urged that the Court construe the statute herein, broadly and liberally, as the appellee has argued.

Such a construction results in the statute being held constitutional and removes any of the "grave doubts on that score." The construction urged will bring justice, equality, and satisfaction to all of the employers and employees and harmonize the scheme of social security worked out so elaborately in this country in the last decade.

POINT IV.

THE ACT MUST BE CONSTRUED LIBERALLY AND ALL EXCEPTIONS TO ITS OPERATION MUST BE CONSTRUED STRICTLY.

That the act should be construed liberally and all exceptions to its operation must be construed strictly is settled law and requires no exhaustive citation of authority.

When the act was declared constitutional by the Supreme Court of the United States, it was on the basis that Congress was empowered to promote the

general welfare; that unemployment was a national evil and that, in the interest of the general welfare, Congress could appropriate funds to remedy the evil.

Helvering v. Davis, 301 U. S. 619, 57 S. Ct. 904;
Steward Machine Company v. Davis, 301 U. S.
 548, 57 S. Ct. 904.

The broad purpose of the legislation to remedy the evils of national unemployment shows the way at once to a liberal and broad interpretation of its coverage, purposes and intents.

The Act contained initially certain exceptions founded upon definite reasons of administrative convenience, or of sovereign supremacy, or of public interest. The fact that the classification was not arbitrary resulted in the sustaining of the exceptions against constitutional challenge. One cannot help but be impressed with the broad interpretation of the Act given in the above cited leading cases by the learned Justice Cardoza.

This broad interpretation exists today and many excellent opinions of other Judges and Justices express it.

For example, in *Grace v. Magruder*, 148 Fed. (2d) 679 at 680:

"The . . . persons involved in this case . . . are obviously subject economically to the evils the laws were designed to combat⁸, and the remedies those laws afford are appropriate for preventing or curing the evils⁹."

The Judge then quotes from Judge Parker of the Fourth Circuit Court of Appeal, at p. 681:

“The Social Security Act . . . was enacted pursuant to a public policy unknown to the common law; and its applicability is to be judged . . . from the purposes Congress had in mind . . .”

Again speaking through Judge Major of the Seventh Circuit Court of Appeal, in *Carroll v. Social Security Board*, 128 Fed. (2d) 876 at 881, the same thought finds expression when the Court says:

“The purpose which Congress had in mind, and the object sought to be accomplished by the enactment before us is aptly stated in *Helvering v. Davis* . . . That it should be liberally construed in favor of those seeking its benefits cannot be doubted.”

Because of the above well established rule of construction, the rule which is its complement is as clearly settled; namely, the exception to the general scope of the Act is subject to strict construction and should not be extended to unduly restrict the coverage and effectiveness of the legislation.

In *Fleming v. Hawk-Eye Pearl Button Co.*, 113 Fed. (2d) 52, Judge Gardiner of the Eighth Circuit, after stating the above rule of construction quoted from the opinion in *U. S. v. Dickson*, 15 Pet. 141 at 165:

“In the last cited case it is said: ‘In short a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof’.”

Judge McCormick in *Latimer v. United States*, 52 Fed. Supp. 228 at 234, phrased the rule of construction forceably as follows:

“Therefore, a realistic approach to the social and economic security of employees in present-day large scale enterprises of all kinds requires that all doubt in construing remedial statutes providing unemployment insurance and old age protection and containing tax impositions should favor coverage rather than exemption.”

The above remarks are repeated with approval in the recent and leading case of *Miller v. Burger*, No. 11,480, C. C. A. 9th, June 5, 1947, 161 Fed (2d) 992.

Judge Shaw in *Cal. E. Com. v. Black Fox Inst.*, 43 Cal. App. 2nd Supp. 868 at 872, comments:

“It sets up a scheme for ameliorating the hardships of unemployment . . . In view of the purpose of these provisions, they should not be whittled down by narrow construction, nor should exemptions not clearly justified by their language be engrafted upon them by judicial interpretation.”

The last word in this respect is to be found in the learned opinion of District Judge Mathes in *Burger v. Social Security Board*, 66 F. Supp. 619 at 626, wherein it is said:

“It is settled that the Social Security Act should be liberally construed in favor of those seeking its benefits. All doubts of interpretation are to be resolved in favor of coverage.”

It is therefore suggested that the rules of construction are established that the Social Security Act

should in common with other remedial legislation be liberally construed and that exceptions to its operation must be strictly construed.

CONCLUSION.

The services were performed after the dried fruit had reached the growers' market and the terminal market and were, therefore, in covered employment. The legislative history and the law of this Circuit point clearly to an affirmance of the decision of the lower Court reversing the Social Security Administrator. Any other interpretation would raise serious constitutional questions which, under rules of construction, are to be avoided. A liberal construction of a remedial statute requires a reversal of the appellant's ruling, as a matter of law, and approval of the District Court's decision.

Respectfully submitted,

ARTHUR L. JOHNSON,

Attorney for Appellee.

Of Counsel:

ROBERT MORGAN of

JOHNSON, MORGAN, THORNE & SPEED

APPENDIX.

APPENDIX.

HOUSE AND SENATE COMMITTEE REPORTS ON GENERAL PURPOSES AND SCOPE OF THE 1939 AMENDMENT IN QUESTION.

Pertinent excerpts other than those cited in the attached brief, of the 121-page House Report and 93-page Senate Report (H. Rept. No. 728, 76th Congress, 1st Sess., pp. 2-18; S. Rept. No. 734, 76th Congr., 1st Sess., pp. 2-19), on the 1939 Amendments to the Social Security Act (emphasis supplied throughout), are as follows:

Coverage.

1. Certain services, including services for agricultural and horticultural associations, voluntary employees' beneficiary associations, local or ritualistic services for fraternal beneficiary societies and *services of employees earning nominal amounts (less than \$45.00 per quarter) of non-profit institutions exempt from income tax, are exempted from old-age insurance and unemployment compensation in order to eliminate cases of inconsequential tax payments.*

2. The term "agricultural labor" is defined so as to clarify its meaning and to extend the exemption to certain types of service which, although not at present exempt, *are an integral part of farming activities.*

3. *About 1,100,000 additional persons (seaman, bank employees and employed persons age 65 and over) are brought under the old-age in-*

insurance system and about 200,000 under unemployment insurance (chiefly bank employees). (H. Rept. p. 3; S. Rept. p. 2).

History of Legislation.

The Social Security Act became law on August 14, 1935. The Bill was passed by an *overwhelming majority* in both the House and the Senate, the votes being 372 to 33 and 77 to 6, respectively. The insurance provisions of the Act (substantially as reported out by this Committee, were upheld by the United States Supreme Court in the cases of *Steward Machine Co. v. Davis* (301 U.S. 548); *Helvering v. Davis* (301 U.S. 619); and *Carmichael v. Southern Coal Co.* (301 U.S. 495).

The enactment of the Social Security Act marked a new era, the Federal Government accepting, for the first time, responsibility for providing a systematic program of protection against economic and social hazards. Though admittedly not perfect or all inclusive, the Social Security Act *did embrace the broadest program for social security ever launched at one time by any Government.* (H. Rept. p. 3, S. Rept. p. 3). * * *

The Committee held extended public hearings on these recommendations and alternative proposals relating to social security, including more than 90 bills introduced in the House. These hearings lasted from February 1 to April 7, dur-

ing which period the Committee sat 48 days and took 2500 pages of testimony. Among the 164 individuals who testified in person there were 3 Senators, 41 Congressmen, 14 Government Officials (Federal and State), 21 labor representatives, 27 employer representatives, 16 economists, and 42 others, representing themselves or various organized groups of citizens. Many of these witnesses filed supplementary statements for the record. Some twenty or thirty other statements from individuals unable to appear were also placed in the record.

Since the conclusion of the public hearings these various proposals have received the constant attention of the Committee. Executive sessions have been held over a period of 6 weeks. The Committee has realized the importance of this subject and has taken seriously its responsibility to recommend to Congress the best possible legislation for *supplementing and improving* our system of social security. The Committee therefore recommends immediate enactment of this Bill. (H. Rept. p. 5; S. Rept. p. 5).

General Purposes and Scope of Amendments.

The present Bill aims to *strengthen and extend the principles and objectives* of the Social Security Act. *The foundations of a permanent program have been laid and it seems wise to build upon the present structure.*

Old-age insurance, unemployment compensa-

tion, and public assistance are now accepted as *permanent* in our fabric of social services. The present Bill is *designed to widen the scope and improve the adequacy and administration of these programs without altering their essential features. Benefits will continue to be payable as a matter of right to workers covered by the insurance programs; aid will continue to be related to need under the assistance programs.* (H. Rept. p. 5; S. Rept. p. 5).

Federal Old-Age Assistance and Survivor Insurance Benefits.

The number of aged persons in our population is steadily growing. In 1900 there were only 3,080,000 persons 65 and over, representing 4.1 percent of the population. This figure reached 6,634,000 or 5.4 percent in 1930, and it is estimated there are about 8,200,000, or 6.3 percent at the present time. Recent estimates indicate that by 1980 we may have over 22,000,000 persons 65 and over, representing 14 to 16 percent of the total population. Recognizing these facts, it is possible to foresee that we shall have a *growing number of aged persons for whom some provision must be made. This has been the experience of all industrial countries.*

In the course of its study of the problem, the Committee has become *increasingly impressed by the need to revise the structure of benefits more closely to the basic needs of our people, now and*

in the future. With limited funds available for this type of insurance protection, individual savings and other resources must continue to be the chief reliance for security. *As a means of affording basis protection*, however, the existing system can be much *improved*. With the advantage of more than three years of study and experience since the passage of the Act and with a greatly enhanced public understanding of the method of social insurance, *the time seems ripe for the revision of the program to afford more adequate protection to more of our people.* (H. Rept. p. 6; S. Rept. p. 6).

Old-age insurance is designed to prevent future old-age dependency; old-age assistance is designed to relieve existing needs. A contributory system of old-age insurance keeps the cost of old-age benefits from becoming excessive and assures support for the aged as an earned right. *If the contributory system is strengthened and liberalized*, the cost of old-age assistance for uncovered groups will not increase so rapidly in future years when the proportion of aged in the population will be higher than at present.

It is essential then that the contributory basis of our old-age insurance system be STRENGTHENED and NOT WEAKENED. Contributory insurance is the best-known method of preventing dependency in old age by enabling wage earners

to provide during their working years for their support after their retirement. By relating benefits to contributions or earnings, contributory old-age insurance preserves individual thrift and incentive, by granting benefits as a matter of right it preserves individual dignity. *Contributory insurance therefore strengthens democratic principles and avoids paternalistic methods of providing old-age security.* Moreover, a contributory basis facilitates the financing of a social insurance scheme and is a safeguard against excessive liberalization of benefits *as well as a protection against reduction of benefits.*

The contributory method in social insurance is no innovation. It had its beginning several hundred years ago in several countries when small groups of workmen banded together in mutual benefit societies to build up protection against unforeseen contingencies. These early friendly societies developed the insurance method of protection which, by a gradual process of evolution, led to modern social insurance, with the Government entering to strengthen cooperative thrift and mutual protection. *The contributory method of social insurance has stood the test of time and experience. Proof of this is the fact that no country which has once adopted a system of contributory social insurance has ever abandoned it.* Many foreign countries, as well as the United States, supplement their contri-

butory scheme with a noncontributory pension scheme based on individual need, *but no country has ever given up the former system in favor of the latter.* (H. Rept. p. 6; S. Rept. p. 6) * * *

Coverage.

Four years ago, when the old-age insurance program was being planned, it was expected that the Act as passed would provide old-age security for about half of the gainful workers in the country. * * *

The most important excluded groups are agricultural labor, domestic service, and certain non-profit organizations; here the Committee decided unanimously that it would be unwise to remove the exemptions from these three groups at the present time. The present Bill does, however, extend old-age insurance coverage to some 1,100,000 more workers by removing the exemption of maritime employment, wage-earners after 65 and certain Federal instrumentalities such as National Banks and State banks which are members of the Federal Reserve Systems.

In order to eliminate the nuisance of inconsequential tax payments the Bill excludes certain services performed for fraternal benefit societies and other nonprofit institutions exempt from income tax, and certain other groups. While earnings of a substantial number of persons are excluded by this recommendation, *the total*

amount of earnings is undoubtedly very small. No estimate is available of the number of persons or amount of earnings so excluded. The intent of the Amendment is to exclude those persons and those organizations in which the employment is part-time or intermittent and the total amount of earnings is only nominal, and the payment of the tax is inconsequential and a nuisance. The benefit rights built up are also inconsequential. Many of those affected, such as students and secretaries of lodges, will have other employment which will enable them to develop insurance benefits. This Amendment, therefore, should simplify the administration for the worker, the employer and the Government. (H. Rept. p. 18; S. Rept. p. 19).

SECTION OF STATUTE RE COOPERATIVES.

Title II, Section 209 (b) of the Social Security Act, as amended in 1939 (42 U. S. C. 409, 53 Stat. 1373), reads in pertinent part as follows:

Definitions.

(b) The term "employment" means any service . . . , except—

(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under Section 101 of the Internal Revenue Code, if—

(1) the remuneration for such services does not exceed \$45.00 . . .

(B) Service performed in the employ of an agricultural or horticultural organization exempt from income tax under Section 101 (1) of the Internal Revenue Code . . .

PERTINENT EXCERPTS FROM CONGRESSIONAL RECORD.

The Congressional Record of June 8, 1939, Vol. 84, Part 6, sets forth the consideration of H. R. 6635 on the Floor of the House, insofar as the "agricultural labor" definition is concerned, as follows: (Emphasis added throughout).

Page 6864:

(During consideration by Committee of the Whole House on the State of the Union).

Mr. Buck. I want now to take up the Amendment that the Committee has prepared defining agricultural labor . . .

The exemption contained in the original Act is justified and should be continued. The clarifying paragraphs that the Ways and Means Committee has put into this Bill are merely for the purpose of interpreting the original decision of Congress that agricultural labor should be exempt. *These paragraphs are based on the theory that what is agricultural work is determined by the nature of the work and not by whom the man is employed. Agricultural work starts with the planting of the crop. It ENDS when that crop has been DELIVERED TO MARKET or to a carrier*

for transportation to market, and all intervening steps should be regarded in the nature of agricultural labor . . .

Mr. Buck. I cannot tell the gentleman that, I will say this much, *that in the opinion of those of us who helped draw this Amendment these various services WHICH FORM AN INTEGRAL PART OF AGRICULTURE* were intended to be covered by Congress in its original enactment; but, frankly, I cannot tell the gentleman what the situation would be in regard to the problem here . . .

Mr. Buck. I am sorry. I cannot yield further on this fur-bearing proposition. I wish to call attention to one or two other matters before my time expires.

Let me call attention to another serious anomaly. If you are the owner of a farm, and you enter into a written agreement with a marketing agent to pick up and pack your crop whether it is fruit or beans or anything else, the labor employed by the marketing agent is considered to be agricultural labor at the present time; *but if you sell your fruit or beans to that same marketing agent and he comes in with a crew and picks your crop, that is not agricultural labor under the rulings of the Bureau of Internal Revenue.* Services performed by the employees of a company handling tobacco in warehouses off the farm but in the immediate neighborhood where the

process of fermentation was carried on, however, have been held to be agricultural, so that the Treasury has applied no uniform rule in connection with its idea of limiting agricultural labor to work on the farm. In the case of cotton ginning, packing lettuce, and so forth, however, a very rigid restriction has been made limiting the exemption to work done on a farm itself.

(Here the gavel fell.)

Mr. Cooper. Mr. Chairman, I yield five additional minutes to the gentleman from California.

Mr. Buck. These curious distinctions produce inequities among people operating in the same commodities in the same localities, and certainly this is an injustice. Now, assuming there is merit to what I said about the reason for the exemption of agricultural labor until such time as both employer and employee have been educated to the point where they will want to be included—and after all, you want these people to be included just as you have wanted the seamen who have come to us asking to be included under this Act—then we ought to have this clarifying Amendment *which is based on the theory that it is not by whom a man is employed but the nature of the work he is doing that constitutes agricultural labor * * **

Page 6867 (June 8, 1939):

Mr. Treadway. Mr. Chairman, I make the point of order that there is no quorum present.

The Chairman. Sixty-four Members present.
Not a quorum.

When 312 Members responded to their names the
Committee resumed its sitting * * *.

FEDERAL GOVERNMENT RULINGS

FEDERAL SECURITY AGENCY SOCIAL SECURITY BOARD

WASHINGTON, D. C.

ARTHUR J. ALTMAYER, CHAIRMAN
ELLEN E. WOODWARD
GEORGE R. BIGGE

February 16, 1945

Mr. Arthur L. Johnson
202 Porter Building
Second and Santa Clara Streets
San Jose 20, California

Dear Mr. Johnson:

I have your letters of January 23 and January 26, 1945 urging coverage under the social security program of dried fruit and raisin packinghouse workers. As you indicate, the definition of "agricultrual labor" written into the Social Security Act in 1939 has been exceedingly difficult to interpret. The Bureau of Internal Revenue and the Bureau of Old-Age and Survivors Insurance have experienced particular difficulty in agreeing upon what activities are "incident to the preparation of fruits and vegetables for market" so as to constitute "agricultural labor." The Bureau of Internal Revenue, however, has held generally that these preparatory or processing services in the dried fruit

industry are excepted from coverage. The Social Security Board has not yet reached a final decision. As you know, the taxing and benefit provisions are separate and each agency must reach its own decision. Until a decision is reached by the Social Security Board, action on claims for benefits based on such employment is being held in abeyance.

The Board fully agrees that dried-fruit workers, as well as other workers who have similar commercial and industrial characteristics, should be covered. Insofar as it would remove all possible doubt that dried-fruit workers are covered, the Board is in sympathy with the objective of the bills introduced by Congressman Anderson at the last and present sessions of Congress, and with the changes suggested in your first letter.

The Board would prefer, however, that all agricultural labor be brought under the Act and that the artificial line that now separates agricultural and nonagricultural workers, so far as the social security program is concerned, be removed. Recommendations to this effect have been made by the Board to Congress. As you are aware, the Wagner-Murray-Dingell Bill introduced in the last Congress, and the bill recently introduced by Congressman Dingell in this session both provide for the extension of coverage to agricultural workers.

Mr. Arthur L. Johnson—2/16/45

While the question of retroactive coverage is not pres-

ently involved since it is by no means certain that dried-fruit workers are now excluded, these workers would be handicapped should the final interpretation of the present law exclude them. As coverage is extended, appropriate modifications should certainly be made in the program in order to overcome the handicaps of previously excluded groups.

We are very glad to learn your views and thank you for your continuing interest in the development of the social security program.

Sincerely yours,

A. J. ALTMAYER,
Chairman.

United States Senate

COMMITTEE ON BANKING AND CURRENCY

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DAVID DELMAN, CLERK	

March 20, 1945

Mr. Arthur L. Johnson
202 Porter Bldg.
2nd and Santa Clara Streets
San Jose 20, California.

Dear Mr. Johnson:

Thank you for sending me copies of your letters of

January 23 and January 26 to Dr. Altmeyer. I regret the delay in replying to your letters, but the pressure of my duties in the Senate and as Chairman of the Senate Banking and Currency Committee has made it impossible for me to keep my correspondence current.

I read your letters with great interest, have discussed the matter with Mr. Altmeyer and I concur in the views which he set forth in the letter he wrote you on February 16.

With all best regards, I am

Very sincerely yours,
ROBERT WAGNER

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FEDERAL RULINGS AFFECTING
SUBCHAPTERS A AND C,
CHAPTER 9, OF THE INTERNAL REVENUE
CODE.

487-S. S. T. 405

SECTION 1426: Definitions. 1940-46-10487

REGULATIONS 106, SECTION S.S.T. 405

402.208: Agricultural labor.

(Also Subchapter C (Federal Unemployment Tax Act), Section 1607; Regulations 107, Section 403.208.)

Status of various types of services rendered by employees of a cooperative association of fruit and vegetable growers for purposes of Subchap-

ters A and C, Chapter 9, of the Internal Revenue Code, as amended by the Social Security Act Amendments of 1939.

Advice is requested whether various types of services rendered by employees of the M Association, a cooperative organization of fruit and vegetable growers, are excepted from "employment" as "agricultural labor" for purposes of Subchapters A and C, Chapter 9, of the Internal Revenue Code, as amended by the Social Security Act Amendments of 1939.

The association supervises the activities of its members and performs services from the beginning of the growing period until the products are on their way to market. It employs inspectors who advise the growers with respect to production methods, obtain crop estimates from time to time for financing purposes, and during the packing and processing season supervise the grading and packing of the products and check the condition of those in storage. It aids the growers in financing the growing, harvesting, and processing of their products, purchases materials and supplies, and stores them until needed by the growers, at which time they are distributed to the growers by truck.

The association manufactures spray materials which it sells exclusively to its members at cost. It also manufactures cider and vinegar from apples raised exclusively by its members. It packs apples, pears, cherries, potatoes, and other fruits and vegetables, all of which are raised by its members. The

association operates a cannery in which it handles only fruits and vegetables produced by its members, and a cold storage warehouse in which its members' products are held for market after they are processed and packed. Ice is manufactured for freight cars carrying the products to market and some electricity is generated for use in the above-mentioned plants. A reservoir and pipe line owned and operated by the association furnish water for power and other purposes in its plants. The association sells a small amount of ice and furnishes some water to a railroad company for the latter's engines. The net returns from these operations aid in reducing the cost of the above-mentioned services to the members of the association. The association employs, among others, department managers, sales promotion men, accountants, clerical workers, and maintenance men.

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EXHIBIT P

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Upon the basis of the facts presented and in view of the provisions of Sections 1426 (h) and 1607 (1) of the Code, as amended, it is held that services performed by employees of the M Association in connection with the cultivation of the soil and the raising and harvesting of products on the farms of its members, and in packing, packaging, processing, grading,

storing (including the actual operation of packing and cold storage equipment but not canning equipment), and delivering to storage or to market, or to a carrier for transportation to market, the fruits and vegetables produced by its members, together with services rendered by officers and other employees of the association in the direct supervision of such services, constitute "agricultural labor" for purposes of Subchapters A and C, Chapter 9, of the Code, as amended.

It is also held that services performed by employees of the M Association in connection with the canning of the products of its members, the manufacture of spray materials, cider, vinegar, and ice, the generation of electricity, the operation of the reservoir and pipe lines under the circumstances stated, the inspection of members' crops, the furnishing of advice to members, the promotion of sales, the repair of the plants and equipment, and clerical work, together with the supervision of such services, constitute "employment" for purposes of such subchapters.

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EXHIBIT P

FEDERAL RULINGS AFFECTING
THE SOCIAL SECURITY ACT
8-S.S.T. 10

SECTION 907: Definitions. XV-27-8157

REGULATIONS 90, ARTICLE 206 (1): S.S.T. 10
Agricultural labor.

Where services are performed by employees of an association of producers in connection with the processing, packing, packaging, transportation, or marketing of farm products, such services do not constitute "agricultural labor" within the meaning of section 907 (c) of the Social Security Act even though the products in connection with which the services are performed were produced by the members of the association.

A ruling is requested whether services performed by individuals engaged as employees in packing fruit constitute "agricultural labor" within the meaning of section 907 (c), Title IX, of the Social Security Act, which defines the term "employment" and excludes "agriculture labor" therefrom.

Article 206 (1) of Regulations 90, promulgated under Title IX of the Social Security Act, defines "agricultural labor" as used in section 907 (c) of the Act as follows:

* * * **AGRICULTURAL LABOR.**—The term "agricultural labor" includes all services performed—

(a) By an employee, on a farm, in connection with the cultivation of the soil, the harvesting of crops, or

the raising, feeding, or management of livestock, bees, and poultry; or

(b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute "agricultural labor," however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

As used herein the term "farm" embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms, plantations, ranches, ranges and orchards.

Forestry and lumbering are not included within the exception.

Wide variations in the method of preparing farm products for market and in the methods of marketing are followed throughout the various States, and wide variations exist in the methods of operation as between the producers of farm products and cooperative organizations of farmers in some instances and between individual farmers and commercial packers and processors in other instances. Agricultural products are often delivered by the actual producer directly to a commercial enterprise in which the producer

has no other interest other than the fact that the enterprise is a purchaser of his products. In other instances the products of the farm are delivered by the producer to a cooperative organization of farmers, of

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—2—

which such producer is a member, and the products are prepared and/or processed in widely varying degrees and marketed on a commercial basis by the cooperative organization, or returned to the producer to be marketed by him in his own way.

The fact that an individual is engaged in handling farm products does not of itself make the services performed by him "agricultural." Services are often performed by employees in connection with the packing, processing, and other preparation of farm products for sale to consumers which are not a part of ordinary farming operations but a part of commercial or manufacturing operations.

It is the opinion of the Bureau that services performed by an employee in connection with the processing, packing, packaging, transportation, or marketing of farm products constitute "agricultural labor" within the meaning of section 907 (c) of the Social Security Act only when those services are performed by an employee of the owner or tenant of the partic-

ular farm on which the product in its raw or natural state was produced. Where such services are performed by individuals who are employed by an association of producers, even though the products in connection with which the services are performed were produced by members of the association, the services of such employees are not excepted under section 907 (c) of the Social Security Act as "agricultural labor," since the individuals are employees of the association and not of a particular producer.

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FEDERAL SECURITY AGENCY

Social Security Administration

Office of Appeals Council

DECISION OF APPEALS COUNCIL

In the case of Case No.

Edgar T. Penn 12-139

(Claimant)

CLAIM FOR

Edgar T. Penn

Primary Insurance Benefits.

(Wage Earner)

554-03-8307

(Social Security Account No.)

This case is before the Appeals Council on request of the claimant for review of the decision of John L.

Landfair, Referee, rendered on February 6, 1946. The referee's decision sets forth the applicable provisions of the Social Security Act, as amended, and no purpose would be served by restatement here. The referee's statement of facts setting forth the conditions and circumstances in the instant case is herewith incorporated by reference.

The Bureau of Old-Age and Survivors Insurance of the Social Security Board (Administration) and the referee, respectively, determined that the services of the claimant as a processor of dried fruit for the California Prune and Apricot Growers Association, a co-operative of San Jose, California, subsequent to December 31, 1939, were exempted as "agricultural labor" by section 209 (1) (4) of the Social Security Act, as amended, and hence, the remuneration received for such services could not be included in the computation of the amount of the claimant's primary insurance benefit.

The referee reached the conclusion that the services of the claimant for the cooperative were rendered prior to the receipt of the produce at a "terminal market" as that term is used in section 209 (1) (4) of the Social Security Act, as amended.

The claimant contends that his services for the co-operative were rendered subsequent to the arrival of the produce at a "terminal market." The issue before us, then, is whether or not the delivery by or for a grower to a cooperative is a delivery to a "terminal market for distribution for consumption" within the

meaning of section 209 (1) (4) of the amended Act.

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The determination of the referee was in accord with the then interpretation of section 209 (1) (4) adopted by the Social Security Board (Administration) at the time of the issuance of the referee's decision. Subsequent to the decision of the referee, the Social Security Administration has changed its interpretative position in respect to section 209 (1) (4) of the amended Act. This change of position is based upon the decision of the United States Circuit Court of Appeals for the Ninth Circuit in affirming on June 5, 1947, the decision of California, Northern Division in the case of *James and Maude Burger vs. Social Security Board*. While the Burger case involved a privately owned corporation instead of a cooperative association such as the one for which the claimant worked it appears clear from the Circuit Court's decision that insofar as section 209 (1) (4) is concerned, services for a cooperative association are to be treated the same as services for a privately owned corporation. The decision of the circuit court refers to the principle expressed by it in *North Whittier Citrus Association* (a cooperative association) *vs. National Labor Relations Board* (109 F. (2d) 76). It was the view of the court in the North Whittier Heights case

that when the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing *it has entered upon the status of industry . . .*"

In the Burger case the term "terminal market" is interpreted by the court to mean the "growers market" i. e., the "market" to which the grower delivers for sale or other disposition his products in the form and at the stage of processing in which such produce is normally or customarily disposed of by the ordinary grower. Applying this interpretation to the term "terminal market" it is abundantly clear, and the Appeals Council finds that the services rendered by the claimant as a dried fruit processor subsequent to December 31, 1939 for the California Prune and Apricot Growers Association, a cooperative, were rendered subsequent to the receipt of the produce at a "terminal market for distribution for consumption."

The Appeals Council further finds that the services so rendered by the claimant were in "employment," and the remuneration received for such services is "wages" under section 209 of the Act, as amended.

It is the decision of the Appeals Council that the wage record of Edgar T. Penn, claimant herein, be revised to effect such additional wage credits and the amount of his primary insurance benefits be recomputed on the basis of such additional wage credits. The decision of the referee is reversed.

OFFICE OF APPEALS COUNCIL

Joseph E. McElvain

Joseph E. McElvain, Chairman

Date: July 15, 1947

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CASE NO. 12-1095

EXHIBIT R

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FEDERAL SECURITY AGENCY

Social Security Administration

Office of Appeals Council

DECISION OF APPEALS COUNCIL

In the case of

Case No.

Marguerite K. Grimley

12-92

(Claimant)

CLAIM FOR

Marguerite K. Grimley

Primary Insurance Benefits

(Wage Earner)

554-03-7972

(Social Security Account No.)

This case is before the Appeals Council on request of the claimant for review of the decision of John L. Landfair, Referee, rendered on February 6, 1946. The referee's decision sets forth the applicable provisions of the Social Security Act, as amended, and no purpose would be served by restatement here. The referee's statement of facts setting forth the conditions and circumstances in the instant case is herewith incorporated by reference.

The Bureau of Old-Age and Survivors Insurance of the Social Security Board (Administration) and

the referee, respectively, determined that the services of the claimant as a processor of dried fruit for the California Prune and Apricot Growers Association, a cooperative, of San Jose, California, subsequent to December 31, 1939, were excepted as "agricultural labor" by section 209 (1) (4) of the Social Security Act, as amended, and hence, the remuneration received for such services could not be credited to the Social Security Wage Account of the claimant. As a consequence of the exclusion of such services, the referee found that the claimant had but 7 of a required 8 quarters of coverage to be a "fully insured" individual (section 209 (g) of the amended Act) and, hence, not entitled to the primary insurance benefit for which she made application on May 27, 1941.

The referee reached the conclusion that the services of the claimant for the cooperative were rendered prior to the receipt of the produce at a "terminal market" as that term is used in section 209 (1) (4) of the Social Security Act, as amended.

The claimant contends that her services for the cooperative were rendered subsequent to the arrival of the produce at a "terminal market." The issue before us, then, is whether or not the delivery by or for a

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CASE NO. 12-1095

EXHIBIT S

xxx

to the primary insurance benefits for which she applied. The decision of the referee is reversed.

OFFICE OF APPEALS COUNCIL

Joseph E. McElvain

Joseph E. McElvain, Chairman

Date: July 16, 1947

12-1093

12-1094

12-1094

CASE NO. 12-1095

EXHIBIT S

Whittier Heights case that "when the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing *it has entered upon the status of industry . . .*"

In the Burger case the term "terminal market" is interpreted by the court to mean the growers market" i.e., the "market" to which the grower delivers for sale or other disposition his products in the form and at the stage of processing in which such produce is normally or customarily disposed of by the ordinary grower. Applying this interpretation to the term "terminal market" it is abundantly clear, and the Appeals Council finds that the services rendered by the claimant as a dried fruit processor subsequent to December 31, 1939, for the California Prune and Apricot Growers Association, a cooperative, were rendered subsequent to the receipt of the produce at a "terminal market for distribution for consumption."

The Appeals Council further finds that the services so rendered by the claimant were in "employment," and the remuneration received for such services is "wages" under section 209 of the Act, as amended, and as a consequence entitles the claimant to three additional quarters of coverage.

It is the decision of the Appeals Council that Marguerite K. Grimley, claimant herein, was a fully insured individual at the time she made application for primary insurance benefits, and is therefore entitled

xxx

to the primary insurance benefits for which she applied. The decision of the referee is reversed.

OFFICE OF APPEALS COUNCIL

Joseph E. McElvain

Joseph E. McElvain, Chairman

Date: July 16, 1947

12-1093

12-1094

12-1094

CASE NO. 12-1095

EXHIBIT S

No. 12497

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

BRYANT ESSICK,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

APR 20 1950

PAUL P. GIBBEN,
CLERK



No. 12497

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

BRYANT ESSICK,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ERNEST A. TOLIN,
United States Attorney,

E. H. MITCHELL and
EDWARD R. McHALE,
Assistants U. S. Attorney,

EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue,
600 U. S. Post Office and Court House
Bldg., Los Angeles 12, Calif.

For Appellee:

ZEUTZIUS & STEFFES,
518 Security Bldg.
510 S. Spring St.
Los Angeles 13, Calif.

In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 9001-Y

BRYANT ESSICK,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

(For Recovery of Federal Gift Taxes)

Plaintiff, Bryant Essick, complains and alleges:

I.

Plaintiff is a citizen of the United States, a resident of the State of California, in Los Angeles County, City of Los Angeles, and within the jurisdiction of this Court.

II.

This is a civil action, arising under the internal revenue laws of the United States, and is for the recovery of federal gift taxes and interest thereon alleged to have been erroneously and illegally assessed against and collected from plaintiff. Jurisdiction is conferred by Title 28, United States Code, section 1346.

III.

Plaintiff, throughout his life, has been and now

is domiciled in California. On August 30, 1940, he married Jeanette Marie Essick. At all times since, they have resided together as husband and wife, in Los Angeles, California.

IV.

At the time of his said marriage, and until March 1, 1941, plaintiff owned as his separate property an undivided one-half partnership interest in Essick Manufacturing Company (known also as Essick Machinery Company), an active business co-partnership whose assets consisted of real and personal property situated at Los Angeles, California.

V.

By deed dated, executed and delivered on March 1, 1941, plaintiff granted, transferred and conveyed to his said wife, by way of gift, a present, existing and equal community property interest in his said undivided one-half partnership interest as it existed on said date. This deed was accepted by plaintiff's wife, and it was recorded on March 26, 1941, in the office of the County Recorder for Los Angeles County, California. A copy of the deed was furnished to the Commissioner of Internal Revenue through his examining revenue agent.

VI.

By virtue of the delivery and acceptance of the deed, as aforesaid, plaintiff and his wife thereupon and thereafter held said property as community

property under the laws of California. One-half of the property so transferred constituted, under both California and federal applicable laws, a valid completed gift from plaintiff to his wife of a one-fourth interest in the entire partnership of said Essick Manufacturing Company.

VII.

Plaintiff's wife's said one-half community property interest became, was and is entitled to the protection of the "due process" clause of the Fifth Amendment, as to the Federal Government, and of the Fourteenth Amendment, as to the State of California. Plaintiff's one-half community property interest was and is entitled to the same protection.

VIII.

The fair market value of the interest in said property transferred and conveyed by plaintiff to his wife was equal in amount to the fair market value of the community property interest which plaintiff retained, and said transfer of March 1, 1941, to plaintiff's wife was subject to gift tax under Sec. 1000(a), I.R.C., and taxable on such basis.

IX.

On or about April 3, 1942, plaintiff filed with the Collector of Internal Revenue at Los Angeles a gift tax return for the calendar year 1941 on Treasury Department Form 709, reporting thereon the aforesaid transfer to his wife under date of March 1, 1941, at a value on said gift date of \$43,-

189.37, less an annual exclusion of \$4,000, and net taxable gifts for 1941 of \$39,189.37, against which plaintiff claimed his then allowable specific exemption of \$40,000 to the extent of said net taxable gifts. Said return was accepted by the Commissioner of Internal Revenue as filed, and more than four years passed without any question being raised by the Commissioner, or his subordinates, with respect to the correctness of said 1941 return.

X.

Between March 1, 1941, and December 31, 1943, inclusive, plaintiff made no further reportable taxable gifts; but on November 16, 1943, plaintiff and his said wife, Jeanette Marie Essick, in accordance with permissive provisions of California law, entered into a written agreement entitled Property Settlement Agreement, which was duly executed and acknowledged by each of them and recorded in the office of the Los Angeles County Recorder at Los Angeles, California, on or about November 22, 1943.

XI.

By said Agreement of November 16, 1943, plaintiff and his wife, among other things, pursuant to the laws of California, changed and converted their entire aforesaid community property partnership interest in the Essick Manufacturing Company (aka Essick Machinery Company) into the separate property of each as tenants in common and agreed that each should hold his and her re-

spective undivided one-half interest free from any and all community property rights or privileges of the other spouse.

XII.

On October 22, 1945, plaintiff filed a donor's gift tax return with Harry C. Westover, as Collector of Internal Revenue at Los Angeles, California, for the calendar year 1943, reporting therein all of the facts with reference to the Agreement of November 16, 1943, attaching a true copy of said Agreement as part of the return, together with a statement of reasons why, in plaintiff's view of the transaction, no taxable gift occurred in 1943. The return indicated that there were no gifts for 1943, that there were no net gifts and that there was no gift tax due.

XIII.

By statutory ninety-day notice, dated November 4, 1946, the Commissioner of Internal Revenue advised plaintiff, by registered mail, that he had determined a deficiency in gift tax against plaintiff as donor, for the calendar year 1943, of \$6,713.51 which, with interest thereon of \$1,280.68, was thereafter assessed against plaintiff who, on May 29, 1947, pursuant to demand therefor, paid said tax and interest to Harry C. Westover, as Collector of Internal Revenue, at Los Angeles, California, in the aggregate amount of \$7,994.19. Said Collector promptly paid said amount into the Treasury of the United States for the use and benefit of the United States.

XIV.

The Commissioner's said determination of gift tax deficiency for 1943 was based on the erroneous theory or conclusion that, so far as here material, the aforesaid "agreement of November 16, 1943, by which certain property previously held as community property was transmuted into tenancies in common," involved a taxable transfer by plaintiff to his wife in 1943 of a one-fourth interest in the Essick Manufacturing Company co-partnership. The Commissioner, in his said determination for the year 1943, reduced the full value of the one-fourth partnership interest, as found by him for November 16, 1943, by the full value of said one-fourth partnership interest as it existed on March 1, 1941, the partnership interest having grown in size and value between the two dates last named.

XV.

In his aforesaid deficiency notice of November 4, 1946, the Commissioner determined that plaintiff completed on November 16, 1943, the transfer of a full one-fourth interest in Essick Manufacturing Company of a value of \$100,000; that the same one-fourth interest was only partially transferred on March 1, 1941; that the value of the same interest on March 1, 1941, was \$43,189.37 and that the latter amount should be deducted from said \$100,000, together with another item of \$3,421.60; that the net value of said 1943 alleged gift was \$43,389.03 and that plaintiff was liable for a gift tax thereon of \$6,713.51.

XVI.

The Commissioner's aforesaid determination was erroneous and his assessment of gift tax and interest against plaintiff based thereon was and is erroneous, illegal and contrary to the applicable provisions of the Internal Revenue Code, California laws and the "due process" clause of the Fifth Amendment of the Constitution of the United States, in that the conversion of said community property partnership interest into a tenancy in common on November 16, 1943, did not involve any transfers of community property by way of gift from plaintiff to his wife within the meaning of any provisions of the Internal Revenue Code and/or California laws. To the extent that Treasury Regulations 108, Sec. 86.2(c) purport to cover as taxable the conversion into tenancies in common of community property between spouses, subsequent to 1942, they are invalid as applied to plaintiff and his wife under the facts involved. Furthermore, Sec. 1000(d), I.R.C., does not impose, and cannot validly be applied to require, gift tax liability against plaintiff for 1943 under the facts alleged in this complaint. In any event, the facts and "due process" clause would require that plaintiff's wife's community property interest in said partnership be treated in 1943, under and for the purposes of Sec. 1000(d), as having been derived originally from her "separate property," her interest having been received by her in March, 1941, by way of a taxable transfer by gift within the

meaning of Sec. 1000(a) and (b), I.R.C., as the same then existed.

If Sec. 1000(d) (which was first made part of the Internal Revenue Code by the Revenue Act of 1942, and made applicable only to 1943 and subsequent years) is applicable to the aforesaid Property Settlement Agreement of November 16, 1943, then Sec. 1000(d) is unconstitutional and invalid as applied to the November 16, 1943, transaction, in that said Sec. 1000(d) operates to deprive both plaintiff and his wife of the property and vested rights of each in respect of property without due process of law in violation of the prohibition there against contained in the Fifth Amendment of the Constitution. The assessment against and collection from plaintiff of the gift tax in question, for 1943, also constitute the unlawful taking of private property for public use without just compensation, and involve the retroactive abrogation and confiscation of lawful rights, property and property interests acquired in 1941, through the medium of arbitrary and discriminatory legislation.

XVII.

On June 14, 1948, plaintiff duly filed with the aforementioned Collector of Internal Revenue at Los Angeles a verified claim for the refund of said gift tax and interest aggregating \$7,994.19 illegally and erroneously collected from plaintiff, as aforesaid, together with interest thereon from May 29, 1947. In his said claim for refund, plaintiff set forth the facts and grounds upon which plaintiff relied in support thereof.

XVIII.

The facts and grounds alleged in this complaint were also set forth as facts and grounds in support of the refund claim described above.

XIX.

More than six months have expired from the date of the filling of said refund claim by plaintiff, and the Commissioner of Internal Revenue has not rendered a decision thereon.

XX.

Neither the sum of \$7,994.19, above mentioned, nor any part thereof, has been refunded to plaintiff.

Wherefore, plaintiff prays judgment against defendant for the sum of \$7,994.19, with interest thereon from May 29, 1947, according to law, plus costs.

ZEUTZIUS & STEFFES,
/s/ GEO. H. ZEUTZIUS,
/s/ A. P. G. STEFFES,
Attorneys for Plaintiff.

[Endorsed]: Filed December 15, 1948.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT AND
FOR DISMISSAL WITH PREJUDICE

The defendant moves that a summary judgment in favor of the defendant and a judgment of dismissal with prejudice be entered in the above entitled action.

This motion is made upon the ground that the complaint fails to state a claim upon which relief can be granted.

It is further made upon the complaint in this case, upon the points and authorities hereto attached, and upon such other evidence, briefs or argument, oral or written, as may be indicated or as may be directed by the Court.

Dated: April 22, 1949.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant United States
Attorneys.

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By /s/ E. H. MITCHELL,
Attorneys for Defendant.

[Endorsed]: Filed April 22, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

Plaintiff, by his attorneys, moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for a summary judgment in his favor against defendant for \$7,994.19, together with interest thereon from May 29, 1947, according to law, and for costs.

This motion is made upon the ground that upon the complaint and files herein, including the affidavit of Bryant Essick together with all exhibits, there is no genuine issue as to any material fact, and plaintiff is entitled to judgment as a matter of law.

Plaintiff also relies upon such other grounds as may be advanced at the hearing of this motion, as well as any other matters or documents which may be received by the Court in connection herewith.

/s/ GEO. H. ZEUTZIUS,

/s/ A. P. G. STEFFES,

Attorneys for Plaintiff.

[Endorsed]: Filed June 24, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF PLAINTIFF, BRYANT ES-
SICK, IN SUPPORT OF HIS MOTION
FOR SUMMARY JUDGMENT.

State of California,
County of Los Angeles—ss.

Bryant Essick, being first duly sworn, deposes and says that he is the plaintiff in the above entitled action and, if called upon as a witness in this case, would testify, and does hereby state in support of his motion for summary judgment, as follows:

He is a citizen of the United States, a resident of the State of California, Los Angeles County, City of Los Angeles. Throughout his life, he has been and now is domiciled in California. On August 30, 1940, he married Jeanette Marie Essick. At all times since then, he and his wife have resided together as husband and wife, and have been domiciled in Los Angeles, California.

At the time of his said marriage, and until March 1, 1941, he owned as his separate property an undivided one-half partnership interest in Essick Manufacturing Company (known also as Essick Machinery Company), an active business partnership whose assets consisted of real and personal property situated at Los Angeles, California.

By deed dated, executed and delivered on March 1, 1941, affiant (hereinafter referred to as plaintiff) granted, transferred and conveyed to his said

wife, by way of gift, a vested, present, existing and equal community property interest in his said undivided one-half partnership interest, as it existed on March 1, 1941. This deed was accepted by plaintiff's wife, and it was recorded on March 26, 1941, in Book 18300, at Page 129 of Official Records, County of Los Angeles, State of California. A copy of the deed was furnished to the Commissioner of Internal Revenue through his examining revenue agent. Likewise, a true copy of the same recorded deed is attached hereto, marked Exhibit A, and by reference is made part hereof. This deed was recorded as Document No. 1055 and bore an endorsement directing that the Recorder mail the deed after its recordation to Mrs. Bryant Essick, plaintiff's said wife. The original deed, after being recorded, was in fact mailed to and received by Mrs. Bryant Essick in an envelope of the County Recorder, postmarked April 7, 1941, which said envelope and deed have been retained and will be produced for inspection upon request.

Following the execution and delivery of the aforesaid deed of March 1, 1941, which was accepted by plaintiff's wife, plaintiff and his wife thereupon and thereafter held said property as their community property until November 16, 1943, when they executed an Agreement with respect thereto, as hereinafter set forth. One-half of the property so transferred on March 1, 1941, into the community property of plaintiff and his said wife, constituted a valid completed gift from plaintiff to his wife

of a one-fourth interest in the entire partnership of the Essick Manufacturing Company.

The fair market value of the interest in said property transferred and conveyed on March 1, 1941, by plaintiff to his wife was equal in amount to the fair market value of the interest which plaintiff retained therein, and said transfer of March 1, 1941, to plaintiff's wife was subject to gift tax and was taxable on such basis. On or about April 3, 1942, plaintiff filed with the Collector of Internal Revenue, at Los Angeles, a donor's gift tax return for the calendar year 1941 on Treasury Department Form 709, reporting thereon the aforesaid transfer of property to his wife under date of March 1, 1941, at a value on said gift date of \$43,189.37, less an annual exclusion of \$4,000, and resulting net taxable gifts for 1941 of \$39,189.37, against which plaintiff claimed his then allowable specific exemption of \$40,000 to the extent of said \$39,189.37 of net taxable gifts. This 1941 gift tax return was accepted by the Commissioner of Internal Revenue as filed and no question was ever raised by the Commissioner, or his subordinates, with respect to the correctness of said 1941 return, until July 29, 1946, when the Internal Revenue Agent in Charge at Los Angeles issued a thirty-day letter covering an examination of plaintiff's gift tax return filed for the subsequent year of 1943, as hereinafter described.

Between March 1, 1941, and December 31, 1943, inclusive, plaintiff made no further reportable tax-

able gifts; but, on November 16, 1943, plaintiff and his said wife, Jeanette Marie Essick, entered into a written agreement entitled Property Settlement Agreement, which was duly executed and acknowledged by each of them and recorded in the office of the Los Angeles County Recorder at Los Angeles, California, on November 22, 1943, as Document No. 772, in Book 20417, at Page 355 of Official Records of Los Angeles County. A true copy of said Property Settlement Agreement, executed November 16, 1943, marked Exhibit B, is attached hereto and by reference made part hereof.

By said Property Settlement Agreement of November 16, 1943, plaintiff and his wife, among other things, converted their entire aforesaid community property partnership interest in the Essick Manufacturing Company (aka Essick Machinery Company) into the separate property of each as tenants in common and agreed that each thereafter should hold his and her respective undivided one-half interest free from any and all community rights or privileges of the other spouse.

On October 22, 1945, plaintiff filed a donor's gift tax return with the Collector of Internal Revenue at Los Angeles, California, for the calendar year 1943, reporting therein all of the facts with reference to the aforesaid Agreement of November 16, 1943, and attaching a true copy of said Agreement as part of the return, together with a statement of the reasons why, in plaintiff's view of the transaction, no transfer of community prop-

erty by way of gift occurred in 1943. The return indicated that there were no gifts for 1943, that there were no net gifts and that there was no gift tax due, but that it was filed because the provisions of Gift Tax Regulation 108, Sec. 86.2(c) asserted that divisions of community property were taxable.

By statutory 90-day notice, dated November 4, 1946, the Commissioner of Internal Revenue advised plaintiff, by registered mail, that he had determined a deficiency in gift tax against plaintiff, as donor, for the calendar year 1943, of \$6,713.51 which, with interest thereon of \$1,280.68, was thereafter assessed against plaintiff who, on May 29, 1947, pursuant to demand therefor, paid said tax and interest to the Collector of Internal Revenue at Los Angeles, California, in the aggregate amount of \$7,994.19. Upon information and belief, plaintiff states that said Collector promptly paid said amount into the Treasury of the United States for the use and benefit of the United States. A true copy of the Commissioner's aforesaid 90-day deficiency notice, dated November 4, 1946, marked Exhibit C, is attached hereto and by reference is made part hereof.

In his said notice of deficiency determination for 1943, the Commissioner asserted that the aforesaid "agreement of November 16, 1943, by which certain property previously held as community property was transmuted into tenancies in common," involved a taxable transfer by plaintiff to his wife

in 1943 of a one-fourth partnership interest in the Essick Manufacturing Company partnership. The Commissioner, in his said deficiency determination for the year 1943, reduced the full value of the one-fourth partnership interest, as found by him for November 16, 1943, by the full value of said one-fourth partnership interest as it existed on March 1, 1941, the partnership interest having grown in size and value between the two dates.

In his aforesaid deficiency notice of November 4, 1946, the Commissioner further asserted as follows: That plaintiff completed on November 16, 1943, the transfer of a full one-fourth interest in Essick Manufacturing Company of a value of \$100,000; that the same one-fourth interest was only partially transferred on March 1, 1941; that the value of the same interest on March 1, 1941, was \$43,189.37 and that the latter amount should be deducted from said \$100,000, together with another item of \$3,421.60; that the said net value of said 1943 alleged gift was \$43,389.03 and that plaintiff was liable for a gift tax thereon of \$6,713.51. Plaintiff denied in his complaint herein that there was any gift in 1943 as determined by the Commissioner with reference to such partnership interest.

Plaintiff states that the conversion of said community property partnership interest into a tenancy in common on November 16, 1943, did not involve any transfer of property, nor any transfer of community property by way of gift, from plaintiff to his wife.

On June 14, 1948, plaintiff duly and timely filed with the Collector of Internal Revenue at Los Angeles, California, a verified claim for the refund of said gift tax and interest aggregating \$7,994.19, together with interest thereon from May 29, 1947. In his said claim for refund, plaintiff set forth the facts and grounds upon which he relied in support thereof. The facts and grounds alleged in his complaint filed herein were also set forth as facts and grounds in support of his said refund claim. More than six months elapsed from the date of the filing of said refund claim by plaintiff and the date of the institution of this action, and the Commissioner of Internal Revenue did not render a decision thereon within that time, nor has said \$7,994.19, or any part thereof, been refunded to plaintiff, nor has any interest thereon been paid to plaintiff.

/s/ BRYANT ESSICK,

Subscribed and sworn to before me this 6th day of June, 1949.

[Seal] /s/ WILMA A. JONES,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Aug. 22, 1952.

Exhibit A
Grant of Community Interest

Whereas undersigned owns an interest in real and personal property hereinafter described as his separate property, all of same having been acquired by him prior to his marriage on August 30, 1940, to Jeanette Marie Essick; and

Whereas it is the desire of undersigned to vest in his said wife a present, consisting and equal community interest in said property and in all property acquired by them from income derived therefrom, the same as if said property had been acquired by them as community property after their said marriage—

Now Therefore undersigned, in consideration of love and affection which he has and bears unto his said wife, does hereby give, grant, convey and confirm unto said Jeanette Marie Essick such an interest in said property as will vest in her a present, existing and equal community interest therein.

It is not the intention of this instrument to create a tenancy in common with said wife but rather to vest in her such an interest as she would have at the present time were said property to be acquired now from earnings of either accumulated or earned since their marriage.

The interest of undersigned in said property is that of owner of a full undivided half interest therein as partner with his father, Newman Essick; and the property referred to consists of all the assets of every kind and nature of that certain business known as Essick Manufacturing Company now

being operated by said partners at 1950 Santa Fe Street, Los Angeles, California. Among the assets of said partnership and business is included real property in the County of Los Angeles, State of California, described as follows:

All of Lots 78 and 79 and that portion of Lot 77 of the Kercheval Tract, as per map recorded in Book 19, page 61 of Miscellaneous Records, in the office of the Recorder of said County, described as follows:

Beginning at a point in the westerly line of said Lot 77, distant thereon and along the westerly line of Lot 76 north 3 degrees 45 minutes, east 68.08 feet from southwesterly corner of said Lot 76; said point of beginning being the northwesterly corner of the land conveyed to Los Angeles Chemical Company, a corporation, by deed dated February 1, 1927, and recorded in Book 6663, page 4. Official Records of said County, thence north 3 deg. 45 min. east along the westerly line of said Lots 77, 78 and 79. 95.15 feet to the northwesterly corner of said Lot 79; thence north 88 deg. 30 min. 15 sec. east along the northerly line of said Lot 79 140 feet to the northeasterly corner thereof; thence south 03 deg. 45 min. west along the easterly line of said Lots 77, 78 and 79, 94.95 feet more or less to the northeasterly corner of said land so conveyed to the Los Angeles Chemical Company; thence north 88 deg. 33 min. 40 sec. west along the northerly line of said land

so conveyed to Los Angeles Chemical Company
140 feet to the point of beginning.

In Witness Whereof I have hereunto set my hand
this 1st day of March, 1941.

/s/ BRYANT ESSICK.

State of California,
County of Los Angeles—ss.

On this 1st day of March, 1941, before me Leo
B. George, a Notary Public in and for said county
and state, personally appeared Bryant Essick, per-
sonally known to me to be the person whose name
is subscribed to the foregoing instrument and he
acknowledged to me that he executed the same.

Witness my hand and official seal.

/s/ LEO B. GEORGE,
Notary Public in and for the county of Los An-
geles, state of California.

Recorded March 26, 1941, in Book 18300 at Page
129 of Official Records, County of Los Angeles,
State of California.

MAME B. BEATTY,

Exhibit B

Property Settlement Agreement

This Agreement made and entered into this 16th
day of November, 1943, by and between Bryant
Essick and Jeanette Marie Essick, his wife, both
of the City and County of Los Angeles, and State

of California. Whereas, the parties hereto are the owners of certain property including bank accounts, securities, partnership interests and other property, all more fully described in Schedule "A" attached hereto and hereby made a part hereof, all of such property being the Community Property of the parties hereto and acquired by them since their marriage on August 30, 1940, and during their residence in the State of California; and Whereas, the parties hereto desire to vest in each other an equal, existing and separate but undivided interest in and to all of such property and in all of the income derived therefrom and in all property acquired with such income, or the rents, profits and issues thereof, all as tenants in common as defined in the Civil Code of California, Sections 685 and 686; and Whereas, the parties hereto desire to vest in each other an equal, existing and separate but undivided interest in and to all income and other property derived by either or both of them as the result of their labor or the products of their minds, all as tenants in common as hereinbefore defined; Now Therefore, the parties hereto, in consideration of the love and affection which each bears to the other, do as of the date hereof, give, grant and convey unto each other such interests in and to all of such property as will immediately transmute such property ownership into tenants in common, as hereinbefore defined, and vest in them an equal, existing and separate but undivided interest therein; and do as of the date hereof terminate all of their interests

therein which may be inconsistent with such interests as tenants in common and do further agree to execute any and all instruments which may be necessary to formally record such Tenancy in common. The parties hereto do hereby further agree that all income and other property derived by either or both of them as the result of their labor or the products of their minds shall be received by them as tenants in common, as hereinbefore defined, and not as Community Property as defined in the Civil Code of California, section 687 or Sections 161a and 164. The parties hereto join in the execution of this agreement for the purpose of making and consenting to such gifts, grants, conveyances and transmutation and accepting such tenancy in common interests as their respective equal, existing and separate but undivided interests. In Witness Whereof, the parties hereto have hereunder set their hands the day and year first herein written.

BRYANT ESSICK,

JEANETTE MARIE ESSICK.

State of California, and
County of Los Angeles—ss.

On this 16th day of November, 1943, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared, Bryant Essick and Jeanette Marie Essick, his wife, known to me to be the persons whose names are subscribed

thereto and acknowledged to me that they executed the within instrument. In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

C. L. TALLACKSON,

Notary Public in and for said County and State.

My Commission Expires Sept. 25, 1945.

Schedule "A"

(a) A one-half ($1/2$) general partnership interest in that certain business known as Essick Machinery Company and as Essick Manufacturing Company, operated as a partnership, with its principal office located at 1950 Santa Fe Avenue, Los Angeles, California.

(b) 668 shares (now in name of Jeanette Essick) and 10 shares (now in name of Bryant Essick) of the corporate stock of West Coast Pipe and Steel Company, a California Corporation.

(c) Deposit Accounts as listed below:

Bank and Branch Security First National Trust and Savings Bank, Vernon Branch.

Type of Account: Commercial.

In the Names of: Bryant Essick or Jeanette Marie Essick.

Balance as of the first day of October, 1943, \$3,668.40.

#772 Copy of original recorded at request of Bryant Essick, Nov. 22, 1943, 9:45 A.M.

Copyist #102, Compared, Mame B. Beatty,
County Recorder, By B. D. Manning (165), Deputy.
\$1.50-9-M.

State of California,
County of Los Angeles—ss.

I hereby certify the foregoing to be a full, true and correct copy of the instrument appearing recorded in Book No. 20417 of Official Records, Page 355, Records of Los Angeles County, and that I have carefully compared the same with the original record.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, this 27th day of May, 1949.

MAME B. BEATTY,
County Recorder,

[Seal] By /s/ P. H. STRONG,
Deputy.

Exhibit C

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of

Internal Revenue Agent in Charge

Los Angeles Division

LA:GT:90D:NAB

Nov. 4, 1946

Mr. Bryant Essick

3756 Effingham Place

Los Angeles 27, California

Dear Mr. Essick:

You are advised that the determination of your gift tax liability for the calendar year 1943 discloses a deficiency of \$6,713.51, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los

Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,
ROBERT E. HANNEGAN,
Commissioner,

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent
in Charge.

NAB:vac

Enclosures:

Statement

Form of waiver

LA:GT:90D:NAB

District of Sixth California

Year: 1943

Donor: Bryant Essick

Statement

Gift tax year	Liability	Assessed	Deficiency
1943	\$6,713.51	\$0.00	\$6,713.51

In making this determination of the federal gift tax liability of the above-named donor, careful consideration has been given to the report of examination dated June 13, 1946.

A copy of this letter and statement has been mailed to your representative, Mr. George H. Zeutzius, 1008 Security Building, 510 South Spring Street, Los Angeles 13, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Gifts:

	Returned	Determined
Schedule A of return:		
Total gifts, other than charitable, public and similar gifts, 1943.....	\$0.00	\$53,389.03
Less: Exclusions	0.00	3,000.00
	<hr/>	<hr/>
Included amount of gifts	\$0.00	\$50,389.03
Specific exemption	0.00	0.00
	<hr/>	<hr/>
Net gifts	\$0.00	\$50,389.03

Explanation of Changes:

Schedule A of return:

Item 1	\$0.00	\$53,389.03
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The determined value represents the value of the transfers from the donor to his wife effected under and by virtue of the property settlement agreement of November 16, 1943 by which certain property previously held as community property was transmuted into tenancies in common. Said value is computed as follows:

Full value of one fourth interest in Essick Manufacturing Company, the transfer of which was completed on November 16, 1943 :

Full value of business \$400,000.00*	
one-fourth thereof	\$100,000.00

Less: (1) Value of same interest as of March 1, 1941 partially transferred to wife and included in 1941 gifts.....\$43,189.37

(2) Value of 329 shares of West Coast Pipe & Steel Co. passing from wife to husband as part of the property settlement and division—

@ \$10.40 per share	3,421.60	46,610.97
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Net value of gift	\$ 53,389.03
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* In making this determination "goodwill" value equal to \$68,199.28 was added to adjusted net worth as of November 16, 1943 of \$331,800.72 to comprise the full determined value of the business of \$400,000.00.

Computation of Tax

	Returned	Determined
Net gifts for 1943	\$ 0.00	\$50,389.03
Total net gifts for preceding years	9,189.37	9,189.37
Total net gifts	\$9,189.37	\$59,578.40
Tax on total net gifts	\$ 0.00	\$ 7,045.95
Tax on net gifts for preceding years	0.00	332.44
Tax on net gifts for 1943	\$ 0.00	\$ 6,713.51
Total tax payable	\$ 0.00	\$ 6,713.51
Total tax assessed	0.00	0.00
Deficiency	\$ 0.00	\$ 6,713.51

[Endorsed]: Filed June 24, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, above named, and in answer to the plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof.

III.

Admits the allegations contained in paragraph III thereof.

IV.

Admits the allegations contained in paragraph IV thereof.

V.

Admits the allegations contained in paragraph V thereof.

VI.

In answer to paragraph VI thereof, defendant admits that, by virtue of the delivery and acceptance of said deed, the plaintiff and his wife thereupon became the co-owners of said property as California community property of the post-1927 type.

The legal conclusions asserted in the second sentence of said paragraph VI are not relevant or pertinent to the issues raised by the complaint or by the refund claim, and therefore do not call for answers thereto.

VII.

In answer to the legal conclusions contained in paragraph VII thereof, defendant admits that all property interests, including community property interests of all spouses, are entitled to protection against unconstitutional attack. In that connection, defendant alleges that the facts set forth in plaintiff's complaint do not evidence or constitute an unconstitutional attack upon the property interests of either the plaintiff or his wife.

VIII.

In answer to paragraph VIII thereof, defendant denies that the fair market value of the community interest received in 1941 by plaintiff's wife was equal to the fair market value of the community interest retained by the plaintiff-husband. In that connection, defendant alleges that said interest transferred by the plaintiff to his wife was never of any direct or immediate economic benefit to her until November 16, 1943, when said community co-ownership was transformed into a tenancy in common co-ownership, as alleged in paragraph X of said complaint; and that on November 16, 1943, there vested in plaintiff's wife, for the first time, the legally enforceable rights and powers, acting individually, (a) to dispose of her undivided half of said properties, either by gift or for a valuable consideration, (b) to possess, manage and control the same, (c) to contract and incur personal debts and obligations on the credit thereof (d) to sue in respect thereof, and (e) to do therewith as she pleased.

The legal conclusions, to the effect that the transaction of March 1, 1941, was legally subject to Federal gift tax and was legally taxable on the basis alleged, are neither relevant nor pertinent to the issues raised by the complaint or refund claim, and therefore do not call for answers thereto.

IX.

The facts alleged in paragraph IX thereof are not relevant or pertinent to the issues raised by the complaint or refund claim, and therefore do not call for answers thereto.

X.

Admits the allegations contained in paragraph X thereof.

XI.

Admits the allegations contained in paragraph XI thereof.

XII.

In answer to paragraph XII thereof, defendant admits that the plaintiff filed a donor's gift tax return for 1943, on the date alleged, and attached thereto a true copy of said agreement of November 16, 1943, together with a statement of the reasons why plaintiff believed that no taxable gift occurred. Defendant denies, however, that no taxable gift occurred in 1943.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the return filed by the plaintiff re-

ported "all of the facts with reference to the Agreement of November 16, 1943."

XIII.

Admits the allegations contained in paragraph XIII thereof, except that defendant alleges that \$7,955.11 was paid to the Collector on the 29th day of May, 1947, and that \$39.08 was so paid on the 2nd day of June, 1947.

XIV.

Admits the allegations contained in paragraph XIV thereof, except that defendant denies that the Commissioner's determination that the 1943 transaction involving a taxable transfer was based upon an erroneous theory or conclusion. Defendant admits, however, that the Commissioner erred in reducing "the full value" of the undivided property interests transferred to the wife in 1943, by the March 1, 1941, full value of such interests. Defendant further admits that such error resulted in an equally erroneous reduction in the amount of the 1946 gift tax deficiency determination and in the 1947 deficiency assessment.

XV.

In answer to paragraph XV, defendant admits that in the 1946 deficiency notice the Commissioner expressed his determination that plaintiff, on November 16, 1943, made a transfer to his wife of property interests having a value of \$100,000; admits that he determined that the net value of said

1943 gift was \$43,389.03; and admits that the Commissioner determined that the plaintiff was liable for a gift tax thereon of \$6,713.51.

The other facts alleged in said paragraph XV are neither relevant nor pertinent to the issues raised by the complaint or refund claim, and therefore do not call for answers thereto.

XVI.

Denies the allegations contained in paragraph XVI thereof.

XVII.

Admits the allegations contained in paragraph XVII thereof.

XVIII.

Admits the allegations contained in paragraph XVIII thereof.

XIV.

Admits that, at the time of the commencement of this suit, more than six months had expired from the date of the filing of said refund claim and admits that at said time the Commissioner of Internal Revenue had not rendered a decision thereon.

XX.

Admits the allegations contained in paragraph XX thereof.

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

By /s/ E. H. MITCHELL,
Attorney for Defendant.

[Endorsed]: Filed August 18, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF BRYANT
ESSICK IN SUPPORT OF HIS MOTION
FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

Bryant Essick, being first duly sworn, deposes and says that this affidavit is supplementary to the affidavit filed herein under date of June 24, 1949, in support of his motion for summary judgment; that if called upon as a witness in this case, he would further testify that on May 29, 1947, he drew his personal check, payable to the order of the Collector of Internal Revenue, for the amount of \$7,994.19, and authorized Geo. H. Zeutzius, one of his attorneys, to sign a letter addressed to the Collector of Internal Revenue, under date of May 29, 1947, in connection with the transmittal to the Collector at Los Angeles of the aforesaid check; that there is attached hereto a photostatic copy of both sides of his said check and of the original letter signed by his attorney, addressed to the Collector, transmitting said check, in payment of all gift tax and interest, the refund of which is sought by the plaintiff's complaint filed herein; that said check and letter, true photostatic copies of which are annexed hereto and by reference made part hereof, were actually delivered to the Collector at Los Angeles on May 29, 1947, and, on said letter, the Collector's cashier duly receipted the aforesaid

check of \$7,994.19; that said check was promptly paid upon presentation to the bank on which it was drawn, as shown by the photostatic copy thereof.

The purpose of this affidavit is to disprove the allegation in paragraph XIII of defendant's answer to the effect that the amount of \$7,994.19 was paid in two separate sums, part on May 29 and part on June 2, 1947.

/s/ BRYANT ESSICK.

Subscribed and sworn to before me this 16th day of September, 1949.

[Seal] /s/ C. L. TALLACKSON,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Sept. 25, 1949.

Law Offices
Zeutzius & Steffes
Suite 518, Security Building
510 South Spring Street
Los Angeles 13, California

May 29, 1947

[Stamp]: Received with remittance May 29, '47.
Coll. Int. Rev., Los Angeles, Cal. JR.

Collector of Internal Revenue
Los Angeles 12, California

Attention: Mr. J. H. Struthoff, Rm. G-8

Dear Sir:

In accordance with telephone conversation of today, there is enclosed the check of our client, Bryant Essick, payable to your order, in the amount of \$7,994.19, in payment of all gift tax and interest to date which has been assessed against him for the calendar year 1943.

Your office advised me today by telephone that the enclosed amount is correct and includes all interest to date.

Very truly yours,

/s/ GEO. H. ZEUTZIUS of
ZEUTZIUS & STEFFES.

GHZ:brc

Enc.

Check

No. 1432

May 29, 1947.

Pay to the order of: Collector of Internal Revenue, \$7,994.19, Seven Thousand Nine Hundred Ninety Four and 19/100 Dollars.

Vernon Branch: Security First National Bank of Los Angeles, 2808 Sante Fe Avenue, Vernon.

/s/ BRYANT ESSICK.

[Stamp]: [Illegible on back of check.]

[Endorsed]: Filed Sept. 19, 1949.

[Title of District Court and Cause.]

DECISION

The motions for summary judgment, heretofore made, argued and submitted, are now decided as follows:

(1) The motion of the plaintiff for summary judgment, dated June 24, 1949, is granted and judgment is ordered for the plaintiff as prayed for in the Complaint, the amount to be computed in accordance with Local Rule 7(h).

(2) The motion of the defendant for summary judgment, dated April 22, 1949, is denied.

Findings and judgment to be prepared by counsel for the plaintiff under Local Rule 7.

Comment

Both parties have moved for summary judgment. Without trying to hold them to a consistency which would result in an admission that each party, by making such motion, concedes that no issuable fact remains to be decided, I am of the view, on the record, that this is, indeed, the case and that there is no issuable fact.

The only question is one of law, whether the agreement of November 16, 1943, between the plaintiff and his wife, converting the community property into a tenancy in common constituted a transfer by way of gift, which was taxable as such. (IRC, Sec. 1000(d).) A consideration of the contentions made at the oral arguments and the numerous memoranda filed before and since, leads me to the conclusion that no taxable gift arose by the transaction.

Hence the ruling above made.

Dated this 13th day of October, 1949.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed October 13, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on September 19, 1949, before the Honorable Leon R. Yankwich, Judge presiding, on plaintiff's and defendant's respective motions for summary judgment, and the following proceedings were had: Plaintiff appeared by Zeutzius & Steffes, by Geo. H. Zeutzius, and defendant appeared by James M. Carter, United States Attorney, by E. H. Mitchell, Assistant United States Attorney; the motions, having been briefed and argued by counsel for both parties, were submitted to the Court for decision on the complaint, answer, supporting affidavits of plaintiff, with annexed exhibits, certified copies of plaintiff's original 1941 and 1943 gift tax returns and documentary evidence of payment of the tax and date thereof; and the Court having found that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law, and having filed its decision herein granting the motion of plaintiff for summary judgment and denying the motion of defendant for summary judgment, and having ordered judgment for plaintiff as prayed for in the complaint, now, being fully advised in the premises, makes its written findings of fact and conclusions of law, as follows:

Findings of Fact

1. This is a civil action, arising under the inter-

nal revenue laws of the United States, and is for the recovery of federal gift taxes and interest thereon alleged to have been erroneously and illegally assessed against and collected from the plaintiff, Bryant Essick. Jurisdiction is conferred by Title 28, United States Code, Section 1346.

2. Plaintiff is a citizen of the United States, a resident of the State of California, in Los Angeles County, City of Los Angeles, and within the jurisdiction of this Court.

3. Plaintiff, throughout his life, has been and now is domiciled in California. On August 30, 1940, he married Jeanette Marie Essick. At all times since, they have resided together as husband and wife, in Los Angeles, California.

4. At the time of his said marriage, and until March 1, 1941, plaintiff owned as his separate property an undivided one-half partnership interest in Essick Manufacturing Company (known also as Essick Machinery Company), an active business copartnership whose assets consisted of real and personal property situated at Los Angeles, California.

5. By deed dated, executed and delivered on March 1, 1941, plaintiff granted, transferred and conveyed to his said wife, by way of gift, a present, existing and equal community property interest in his said undivided one-half partnership interest as it existed on said date. This deed was accepted by plaintiff's wife, and it was recorded on March 26, 1941, in the office of the County Recorder for Los Angeles County, California. A copy of the deed was

furnished to the Commissioner of Internal Revenue through his examining revenue agent.

6. By virtue of the delivery and acceptance of the deed, as aforesaid, plaintiff and his wife thereupon and thereafter held said property as community property under the laws of California. One-half of the property so transferred constituted, under both California and federal applicable laws, a valid completed gift from plaintiff to his wife of a one-fourth interest in the entire partnership of said Essick Manufacturing Company.

7. The fair market value of the interest in said property, transferred and conveyed by plaintiff to his wife on March 1, 1941, was equal in amount to the fair market value of the community property interest which plaintiff retained.

8. On or about April 3, 1942, plaintiff filed with the Collector of Internal Revenue at Los Angeles a gift tax return for the calendar year 1941 on Treasury Department Form 709, reporting thereon the aforesaid transfer to his wife under date of March 1, 1941, at a value on said gift date of \$43,189.37, less an annual exclusion of \$4,000, or net taxable gifts for 1941 of \$39,189.37, against which plaintiff claimed his then allowable specific exemption of \$40,000 to the extent of said net taxable gifts. Said return was accepted by the Commissioner of Internal Revenue as filed, and more than four years passed without any question being raised by the Commissioner, or his subordinates, with respect to the correctness of said 1941 return.

9. Between March 1, 1941, and December 31, 1943, inclusive, plaintiff made no further reportable taxable gifts; on November 16, 1943, plaintiff and his said wife, Jeanette Marie Essick, in accordance with permissive provisions of California law, entered into a written agreement entitled Property Settlement Agreement, which was duly executed and acknowledged by each of them and recorded in the office of the Los Angeles County Recorder at Los Angeles, California, on or about November 22, 1943.

10. By said Agreement of November 16, 1943, plaintiff and his wife, among other things, pursuant to the laws of California, converted their entire aforesaid community property partnership interest in the Essick Manufacturing Company (also known as Essick Machinery Company) into the separate property of each as tenants in common and agreed that each should hold his and her respective undivided one-half interest free from any and all community property rights or privileges of the other spouse.

11. On October 22, 1945, plaintiff filed a donor's gift tax return with Harry C. Westover, as Collector of Internal Revenue at Los Angeles, California, for the calendar year 1943, reporting therein the facts with reference to the Agreement of November 16, 1943, attaching a true copy of said Agreement as part of the return, together with a statement of reasons why, in plaintiff's view of the transaction, no taxable gift occurred in 1943. The return indicated that there were no gifts for 1943,

that there were no net gifts and that there was no gift tax due.

12. By statutory ninety-day notice, dated November 4, 1946, the Commissioner of Internal Revenue advised plaintiff, by registered mail, that he had determined a deficiency in gift tax against plaintiff as donor, for the calendar year 1943, of \$6,713.51 which, with interest thereon of \$1,280.68, was thereafter assessed against plaintiff who, on May 29, 1947, pursuant to demand therefor, paid said tax and interest to Harry C. Westover, as Collector of Internal Revenue, at Los Angeles, California, in the aggregate amount of \$7,994.19. Said Collector promptly paid said amount into the Treasury of the United States for the use and benefit of the United States.

13. In arriving at his determination of gift tax deficiency for 1943, the Commissioner determined, so far as here material, that the aforesaid "agreement of November 16, 1943, by which certain property previously held as community property was transmuted into tenancies in common," involved a taxable transfer by plaintiff to his wife in 1943 of a one-fourth interest in the Essick Manufacturing Company co-partnership. The Commissioner, in his said determination for the year 1943, reduced the full value of the one-fourth partnership interest, as found by him for November 16, 1943, by the full value of said one-fourth partnership interest as it existed on March 1, 1941, the partnership interest

having grown in size and value between the two dates last named.

14. In his aforesaid deficiency notice of November 4, 1946, the Commissioner further determined as follows: That plaintiff completed on November 16, 1943, the transfer of a full one-fourth interest in Essick Manufacturing Company of a value of \$100,000; that the same one-fourth interest was only partially transferred on March 1, 1941; that the value of the same interest on March 1, 1941, was \$43,189.37 and that the latter amount should be deducted from said \$100,000, together with another item of \$3,421.60; that the net value of said 1943 alleged gift was \$43,389.03 and that plaintiff was liable for a gift tax thereon of \$6,713.51. (In its answer to the complaint, the defendant United States now alleges that the Commissioner erred in reducing the 1943 valuation of the partnership interest by its March 1, 1941, value. However, this admission does not affect this Court's holding of non-taxability of the 1943 transaction.)

15. On June 14, 1948, plaintiff duly filed with the aforementioned Collector of Internal Revenue at Los Angeles a verified claim for the refund of said gift tax and interest aggregating \$7,994.19 collected from the plaintiff, as aforesaid, together with interest thereon from May 29, 1947. In his said claim for refund, plaintiff set forth the facts and grounds upon which plaintiff relied in support thereof.

16. The facts and grounds alleged in plaintiff's

complaint were also set forth as facts and grounds in support of the refund claim described above.

17. At the time of the commencement of this action, more than six months had expired from the date of the filing of said refund claim by plaintiff, and the Commissioner of Internal Revenue had not rendered a decision thereon.

18. Neither the total sum of \$7,994.19, above mentioned, nor any part thereof, has been refunded to plaintiff.

Upon the foregoing findings, the Court makes and enters the following:

Conclusions of Law

1. Plaintiff has complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this action.

2. The pleadings, affidavits, papers and admissions submitted in connection with the motions for summary judgment create no genuine issue as to any material fact. Summary judgment is proper in this case.

3. The deed executed and delivered March 1, 1941, resulted in a complete gift by the plaintiff to his wife of an undivided community property one-half interest in said partnership interest, and plaintiff correctly filed his federal gift tax return in respect thereof for 1941.

4. The written Agreement of November 16, 1943, between plaintiff and his wife, converting the community property into a tenancy in common, did not

involve, result in, or constitute a transfer by way of gift, within the meaning of the gift tax provisions of the Internal Revenue Code. (Sec. 1000(d), I.R.C.)

5. The Commissioner's determination of gift tax liability against plaintiff for the calendar year 1943 was erroneous and unlawful and his assessment of gift tax and interest thereon against plaintiff in the amounts of \$6,713.51 and \$1,280.68, respectively, was erroneous, illegal and contrary to law, in that the conversion of said community property partnership interest into a tenancy in common on November 16, 1943, did not involve any transfer of community property by way of gift from plaintiff to his wife, within the meaning of any provisions of the Internal Revenue Code. To the extent that Section 86.2(c) of Treasury Regulations 108 purports to hold as taxable the conversion into tenancies in common of community property by spouses, subsequent to 1942, they are invalid as applied to plaintiff and his wife under the facts involved.

6. Plaintiff incurred no federal gift tax liability for the calendar year 1943, and overpaid his federal gift tax for such year in the amount of \$6,713.51 and interest of \$1,280.68, both of which amounts were paid by him to the Collector of Los Angeles on May 29, 1947.

7. Under the law and the undisputed facts, plaintiff is entitled to recover judgment against the defendant for the principal amount of \$7,994.19, to-

gether with interest thereon from May 29, 1947, according to law.

Dated: October 19, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Approved as to Form:

GEORGE M. CARTER,
U. S. Attorney,

By /s/ E. H. MITCHELL,
Asst. U. S. Attorney.

[Endorsed]: Filed October 20, 1949.

In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 9001-Y

BRYANT ESSICK,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause came on for hearing on September 19, 1949, before the Honorable Leon R. Yankwich,

Judge presiding, on plaintiff's and defendant's respective motions for summary judgment, and the following proceedings were had: Plaintiff appeared by Zeutzius & Steffes, by Geo. H. Zeutzius, and defendant appeared by James M. Carter, United States Attorney, by E. H. Mitchell, Assistant United States Attorney; the motions, having been argued by counsel for both parties, were submitted to the Court for decision and the Court having found that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law, and having filed its decision granting the motion of plaintiff for summary judgment as prayed for in the complaint, and denying the motion of defendant for summary judgment, and having filed its written findings of fact and conclusions of law,

Now, Therefore, by reason of the law and the facts herein,

It Is Ordered (1) that plaintiff's motion for summary judgment be and the same hereby is granted; (2) that defendant's motion for summary judgment be and the same hereby is denied; and it is

Further Ordered, Adjudged and Decreed that the plaintiff, Bryant Essick, do have and recover judgment against the defendant, United States of America, in the amount of \$7,994.19, together with interest thereon at the rate of six (6) per centum per annum from May 29, 1947, in accordance with

Section 2411(a) of Title 28, United States Code,
as amended.

Dated: This 19th day of October, 1949.

/s/ LEON R. YANKWICH,
United States District Judge.

Approved as to form and computation required
under Rule 7(h) :

JAMES M. CARTER,
United States Attorney

By /s/ E. H. MITCHELL,
Assistant United States
Attorney.

Judgment entered Oct. 20, 1949. Docketed Oct.
20, 1949, Book 61, Page 66.

EDMUND L. SMITH,
Clerk,

By /s/ C. A. SIMMONS,
Deputy.

[Endorsed]: Filed October 20, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above Named Plaintiff, and to His Attor-
neys, Geo. H. Zeutzius and A. P. G. Steffes,
510 South Spring Street, Los Angeles 13,
California:

You, and Each of You, Are Hereby Advised that

the defendant, United States of America, does hereby appeal from the judgment entered in the above entitled action on October 20, 1949.

Dated: This 16th day of December, 1949.

By /s/ E. H. MITCHELL,
Attorney for Defendant,
United States of America.

[Endorsed]: Filed December 16, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
CAUSE ON APPEAL

Upon motion of defendant-appellant, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 16th day of March, 1950.

Dated: January 20, 1950.

/s/ LEON R. YANKWICH,
United States District Judge.

Presented by:

/s/ E. H. MITCHELL,
Assistant U. S. Attorney.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

Defendant and appellant requests that the complete record and all the proceedings and evidence in the above entitled action be incorporated in the record on appeal, including the following:

1. Complaint;
2. Defendant's Motion for Summary Judgment and for Dismissal, dated and filed April 22, 1949;
3. Plaintiff's Motion for Summary Judgment filed June 24, 1949;
4. Answer filed August 18, 1949;
5. Decision of Judge Leon R. Yankwich, dated and filed October 13, 1949;
6. Findings of Fact and Conclusions of Law, filed October 20, 1949;
7. Judgment, filed and entered October 20, 1949; Entered Judgment Book 61, page 66;
8. Plaintiff's Exhibit 2, accepted in evidence September 19, 1949;
9. Plaintiff's Exhibit 1, accepted in evidence September 19, 1949;
10. Affidavit of plaintiff, Bryant Essick, in support of his Motion for Summary Judgment, with exhibits attached, filed June 24, 1949;
11. Supplemental Affidavit of Bryant Essick in support of his Motion for Summary Judgment, with exhibits attached, filed September 19, 1949;

12. Notice of Appeal, dated and filed December 16, 1949;

13. Order Extending Time to Docket Cause on Appeal, dated and filed January 20, 1950; and

14. This designation of portions of the record to be contained in the record on appeal.

Dated: February 9, 1950.

By /s/ E. H. MITCHELL,
Attorney for Defendant-
Appellant.

[Endorsed]: Filed February 9, 1950.

PLAINTIFF'S EXHIBIT No. 1

United States of America
[Emblem]

Treasury Department
Washington

May 20, 1949.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Gift Tax Return for 1943 (with affidavit, copy of agreement, schedules and balance sheets attached) filed by Bryant Essick, Los Angeles, California, on file in this Department.

(Space for use of Collector)

ORIGINAL
UNITED STATES
GIFT TAX RETURN
CALENDAR YEAR 19 43

(Space for use of Bureau)

(To be filed in duplicate with the Collector of Internal Revenue for the donor's district not later than the 15th day of March following the close of the calendar year)

DONOR Bryant Eislich
(Given name) (Middle name or initial) (Surname)
ADDRESS 3756 Eppingham Place, Los Angeles
CITIZENSHIP United States Cal.
RESIDENCE (Same as above)

OCT 22 1945

Col. of Int. Rev.
6th Dist. Cal.



Have you (the donor), during the calendar year indicated above, without an adequate and full consideration of money's worth, made any transfer exceeding \$3,000 in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No.")

- By the creation of a trust (No) or the making of additions to a trust previously created (No), in either case for the benefit of a person or persons other than yourself, and with respect to which you retained no power to revoke the beneficial title to the property in yourself or to change the beneficiaries or their proportionate benefits; or by relinquishing every such power that was retained in a previously created trust (No).
- By purchasing a life insurance policy (No) or the payment of a premium on a previously issued policy (No), the proceeds of which are in either case payable to a beneficiary other than your estate, and with respect to which you retained no power to revoke the beneficial title to the property in yourself or to change the beneficiaries or their proportionate benefits; or by relinquishing every such power that was retained in a previously issued policy (No).
- By conveying title to another and yourself as joint or tenants to a young wife or husband and yourself as tenants by the entirety (No).
- By the exercise or release of a power of appointment except as provided in subparagraphs 1 and 2 of section 8 of the instructions (No).
- By converting community property to another, or by converting community property into separate property of your spouse or into a tenancy by the entirety of yourself and spouse (or other similar ownership), to the extent of your interest as prescribed by the rule set forth in section 9 of the instructions (See Schedule A).
- By any other method, direct or indirect (No).

If the answer is "Yes" to any of the foregoing, such a transfer should be fully disclosed under schedule A.

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

- Total included amount of gifts for year (item c, schedule A) (See Schedule A) none
- Total deductions for charitable, public, and similar gifts for year (item c, schedule A) none
- Specific exemption claimed (see section 11 of instructions) none
- Total deductions (item 2 plus item 3) none
- Amount of net gifts for year (item 1 minus item 4) (See Schedule A) none

COMPUTATION OF TAX (see section 15 of instructions)

- Amount of net gifts for year (item 5, above) (See Schedule A) none
- Total amount of net gifts for preceding years (item c, schedule C) none
- Total net gifts (item 1 plus item 2) (See Schedules A and C) 189.37
- Tax computed on item 3 0.00
- Tax computed on item 2 0.00
- Tax on net gifts for year (item 4 minus item 5) (No tax due or incurred, but see Schedule A)

AFFIDAVIT OF PERSON FILING RETURN

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Federal gift tax law and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedule A was made by me (the donor) during said calendar year.

Sworn to and subscribed before me this 18 day of Oct, 1945
W. J. Allacker Notary Public
(Signature and title of officer administering oath)

Bryant Eislich
(Signature of donor/executor/other person)
(Address of person filing return)

AFFIDAVIT OF PERSON PREPARING RETURN

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

Sworn to and subscribed before me this 22nd day of October, 1945
Geo. H. Zentius
(Signature and title of officer administering oath)
Geo. H. Zentius
Ella Calif.

Geo. H. Zentius
(Signature of person preparing return)
GEORGE H. ZENTZIUS
SUITE 1008 SECURITY BLDG.
LOS ANGELES 13, CALIF.
(Address of person preparing return)

Schedule A—Total Gifts During Year
(see sections 5, 6, 7, 8, 9, 10, 12, and 16 of instructions)

(Schedule A is attached hereto)

Schedule B—Deductions for Charitable, Public, and Similar Gifts
During Year (see sections 10 and 13 of instructions)

[No data shown]

Schedule C—Returns, Amounts of Specific Exemption, and Net
Gifts for Preceding Years (subsequent to June 6, 1932)

Calendar Year	Collection District in Which Prior Return Was Filed	Amount of Specific Exemption	Amount of Net Gifts
1941	6th Collection District of California, Los Angeles	\$39,189.37	none
(a)	Totals for preceding years (without adjustment for reduced specific exemption)	\$39,189.37	none
(b)	Amount, if any, by which total specific exemption, line <i>a</i> , exceeds \$30,000 (see section 14 of instructions)		\$9,189.37
(c)	Total amount of net gifts for preceding years (total, last column, line <i>a</i> , plus amount, if any, line <i>b</i>)		\$9,189.37

[Stamped]: Bureau Record.

Collector of Internal Revenue,
Los Angeles 12, California.

Re: Bryant Essick,
3756 Effingham Place,
Los Angeles, California.

Sir:

I hereby solemnly swear that my delinquency in
filing a Federal Gift Tax Return on Form 709 for
the calendar year 1943, as required by applicable
Gift Tax Regulations, was due to no intent, wilful

or otherwise, on my part to violate the Internal Revenue Laws or Regulations, especially if it should be held that a return was legally required, but was occasioned by unintentional oversight, the facts concerning which include the following:

I employed a tax consultant in the fall of 1943 to prepare gift tax returns for filing by March 15, 1944, relative to the transactions described in the attached return. I thereafter unintentionally lost track of the matter because of the pressure of my duties in managing a manufacturing business and the disarming of my memory resulting from having entrusted the task to said consultant in whom I had confidence and for whose services I had paid in advance. The matter next came to my attention after March 15, 1944. I promptly checked with the tax consultant to ascertain whether a gift tax return had been prepared and filed, and he apparently had no clear recollection for he reported that he checked into the matter and subsequently, on February 8, 1945, advised me that he searched his records and found no evidence that the return had been filed, but stated that he seemed to have a very clear record of having dictated a letter which was to have been attached to the return. Said tax consultant on February 8, 1945, promised to prepare the necessary return to be then and there filed with a necessary letter of explanation and for my signature. However, he stated that no tax would be payable and no penalty would be involved. On April 26, 1945, not having received the return, I again

insisted on said tax consultant immediately preparing the same and threatened to employ someone else to do so if he should fail to respond within 15 days. On May 10, 1945, said consultant again agreed to prepare the necessary gift return. He requested, that I furnish certain additional information for the purpose and not having heard from him, I, on July 13, 1945, again requested that he prepare the return immediately and forward same to me together with a letter of explanation covering his failure in the premises, to be filed with the return and an affidavit by me.

On July 24, 1945, said tax consultant returned certain papers and information which I had previously given or caused to be given to him for the purpose of preparing a gift tax return for 1943, stating that he, said tax consultant, had come to the conclusion that no gift tax return should be filed for 1943.

Thereupon through my general attorney, I immediately employed a lawyer specializing in tax matters for the purpose of having him examine into the 1943 transactions with my wife for the purpose of determining whether gift tax returns should have been filed and, if so, to prepare them for execution and filing by me. The attached return is the result of my recent employment of the attorney who has signed the return as the person preparing the same.

I respectfully request that the foregoing statement be accepted as satisfactory, that no action be

taken against me in the matter and that no penalties be imposed.

/s/ BRYANT ESSICK.

Subscribed and sworn to before me this 18 day of October, 1945. .

[Seal] /s/ C. L. TALLACKSON,
Notary Public in and for the County of Los
Angeles, State of California.

My Commission Expires Sept. 25, 1949.

Bryant Essick
3756 Effingham Place
Los Angeles, California
1943 Gift Tax Return
Schedule A

On November 16, 1943, taxpayer and his wife, Jeanette Marie Essick, evenly divided certain community property into separate property, to be held by them as tenants in common under Sections 685 and 686, California Civil Code. There is attached hereto a true copy of written agreement executed by them on November 16, 1943.

Re: Community Property Partnership Interest

As a result of said community division on November 16, 1943, each spouse thereupon held as separate property an undivided one-half of a half interest in a general partnership known as

Essick Machinery Company and Essick Manufacturing Company, 1950 Santa Fe Avenue, Los Angeles, California. The value of each separate interest in said half interest in the partnership as of November 16, 1943, was \$82,950.18* based on an aggregate net worth for the partnership of \$331,800.72. See the two partnership balance sheets attached hereto. Prior to March, 1941, the partnership interest was taxpayer-husband's separate property. By written grant of March 1, 1941, it was converted into community property and a gift tax return was filed with respect to the gift of one-half thereof to said Jeanette Marie Essick, as required by the Internal Revenue Code.

Re: Stock Belonging to Wife
and Community Stock

The agreement of November 16, 1943, in a schedule annexed thereto, referred to 678 shares of stock in the West Coast Pipe and Steel Company, a California Corporation, of Los Angeles. Six hundred sixty eight of said 678 shares were the separate property of said Jeanette Marie Essick on November 16, 1943, by virtue of their gift to her on December 10, 1942, by taxpayer out of community property. The November 16, 1943, agreement and its annexed schedule, read together, mistakenly convey the idea

[Handwritten marginal note]: Where is his return?

*This value results by adding 21/24 of the total increase in partnership net worth between 12/31/42 and 12/31/43, to the net worth as of 12/31/42.

that said 668 shares may have been community property on November 16, 1943. Actually, only the 10 remaining shares standing in the name of taxpayer-husband were community property. Jeanette Marie Essick made a gift to taxpayer on November 16, 1943, of 329 of the 668 separate property shares, standing in her name, and relinquished her community interest in the remaining 10 shares to taxpayer as his separate property. The stock was traceable originally to taxpayer's separate property through the aforesaid partnership, which acquired said West Coast stock and then distributed the same. The value of each share on November 16, 1943, was \$32.81678, based on a corporate net worth of \$71,830.83, according to the attached balance sheet dated October 30, 1943. The stock of the corporation on November 16, 1943, consisted of 1360 outstanding shares held by taxpayer, his wife, his father and mother and five other individuals. The stock was and is not sold on any market. The last sales prior to November 16, 1943, occurred in 1942, at \$6.50 per share. They were stock purchases from many stockholders who had refused \$6 per share but were willing to accept \$6.50.

Re: Joint Commercial Bank Account

The agreement of November 16, 1943, read with its annexed schedule, purported to effect the division of a joint commercial bank account in the names of taxpayer and his said wife with the Security-First

National Trust and Savings Bank, Vernon Branch. The account was maintained for household and joint living expense purposes exclusively, was never changed from a joint account on the books of the bank, and was never used since for any other than the aforesaid purposes. It should never have been described in the schedule and was never the subject of a gift between the parties nor was it ever reduced to the separate property of either. The total amount in the account as of November 16, 1943, was \$3,144.49.

Re: Taxpayer's Position and Conclusions

All community property which was divided between taxpayer and his wife on November 16, 1943, had been the subject of, or was traceable to, a taxable transfer of separate property of and by taxpayer to his wife, Jeanette Marie Essick, on March 1, 1941, by written grant; that is to say, he converted his separate property on March 1, 1941, into community property. In 1941, the conversion of separate property of a spouse into community property was taxable under Sec. 1000(a) and (b) I.R.C. as a gift to the other spouse to the extent of one-half thereof. Sec. 1000 (a) and (b) remains unchanged. Therefore, taxpayer was required to and did file a gift tax return for 1941, reporting as taxable the gift to his wife of one-half of his half interest in said Essick Machinery Company partnership, which was the subject of the March 1, 1941, transfer.

The 678 shares of West Coast referred to above were acquired by said partnership by purchase early

in 1942 and later, in June 1942, were distributed by it and, when distributed to taxpayer, constituted community property. When 668 of the 678 shares were given by taxpayer to his wife on December 10, 1942, as her separate property, the transaction involved a gift by the husband of one-half thereof (or 334 shares) out of community property, because one-half belonged to him and the other half belonged to her. Such was the Treasury's interpretation of the gift tax law respecting gifts prior to January 1, 1943. (CCH Fed. Gift Tax 1945, Par. 3935.175.)

Taxpayer's position with reference to these transactions is as follows:

1. The division on November 16, 1943, of the community property consisting of the partnership interest did not result in any taxable gift to Jeanette Marie Essick because one-half of said community property already belonged to her and had been the subject of a taxable gift to her in March 1941, by reason of Sec. 1000 (a) (b) I.R.C. If sec. 1000 (d) I.R.C., be held applicable to the 1943 transaction, then Sec. 1000 (d) should be construed as requiring Jeannette Marie Essick's half of the community traceable to the March 1941 gift to be treated as having been derived from her separate property within the meaning of the language of Sec. 1000 (d) which excepts the wife's separate property from the "gifts of the husband" category. If this reasoning is rejected and it is determined that Sec. 1000 (d) operates to require the return and taxation of one-half of the community interest as a gift by taxpayer-husband to his wife in 1943, then taxpayer asserts

that Sec. 1000 (d) cannot validly impose a gift tax on the conversion of community into separate property in a case, such as this, where the community property became such prior to January 1, 1943, as the result of a taxable gift of his separate property to his wife, as shown by his 1941 return. The wife's community half, having been once validly subjected to the gift tax provisions on the 1941 transfer to her, cannot again be subjected to gift tax on division of the community and partition to her of her half share therein. To subject her interest to a gift tax in 1943 would result in unlawful double taxation on the fantastic theory that the husband twice made a gift of the same property to his wife, and that the second gift occurred notwithstanding the fact her ownership under the first gift remained uninterrupted and no retransfer had been made to her husband. If Sec. 1000 (d) must be so construed, it is discriminatory, invalid and violative of the "due process" clause of the Fifth Amendment. Once property has been validly taxed on the legal and statutory concept that it was transferred to a spouse, it cannot thereafter again be subjected to the same type of tax on a new theory that it has again been transferred to the same transferee spouse, when the parties merely partition or divide their existing legal interests.

Furthermore, Sec. 1000 (d), by its terms, does not apply to divisions of community property between spouses. The section provides that the property excepted from the "gifts of the husband" category "shall be considered to be gifts of the wife." Cer-

tainly, Congress didn't intend to treat the partition to the wife of her undivided community interest as a gift by herself to herself to the extent that the original source thereof was economically attributable to her. Yet such necessarily is the meaning ascribed to the section by the regulations (Sec. 86.2 (c), in providing for the inclusion as gifts of divisions of community property occurring after 1942. Obviously, the language of sec. 1000 (d), given its plain and ordinary meaning and read in conjunction with Sec. 1000 (a) and (b), embraces only gifts made to third persons by the marital community—not to divisions of community between spouses. Clearly, the current gift tax regulations are invalid insofar as they attempt to include within the section's operation the division of community property between spouses and the present exemption of transfers of separate into community property.

2. With respect to the relinquishment to taxpayer by Jeanette Marie Essick of her community interest in the 10 shares of West Coast Pipe and Steel Company stock on November 16, 1943, no taxable gift occurred under the Treasury's interpretation of the law. The shares were received by taxpayer in 1942 in a partnership distribution and the partnership interest at said time was community property. However, the partnership interest had been his separate property, originally, prior to March 1, 1941, when he converted it into community property.

3. The transfer on November 16, 1943, to taxpayer of 329 of the 668 shares of West Coast stock

standing in the name of Jeanette Marie Essick, being her separate property by previous gift to her, did not result in any gift by taxpayer to his wife, even assuming validity of Sec. 1000 (d). The latter section by its terms embraces only gifts of community property. Any reference to the shares in the November 16, 1943, Agreement was contrary to the facts insofar as concerns any implication therein that the shares were community property. Certificate No. 125 was issued to taxpayer for the 329 shares transferred to him on November 16, 1943.

4. The \$3,144.49 household bank account was never the subject of a completed or taxable gift.

5. There were no reportable or taxable gifts by the taxpayer-husband in 1943, but because of the possibility the Bureau of Internal Revenue may claim otherwise, all facts are given herewith in good faith in order to avoid any basis for an assertion that taxpayer has violated the revenue laws.

6. If it should be determined by the Commissioner that a taxable gift occurred in 1943, by virtue of Sec. 1000 (d), I.R.C. taxpayer further states that said subsection is invalid and unconstitutional also for substantially the same reasons as were advanced in connection with Sec. 811 (e) (2) I.R.C., in *United States v. Rompel, Jr., Admr. (Herbst Est.)* and *Fernandez v. Wiener*, in which the Supreme Court noted jurisdiction on May 7, 1945.

Property Settlement Agreement

This Agreement made and entered into this 16th day of November, 1943, by and between Bryant

Essick and Jeanette Marie Essick, his wife, both of the City and County of Los Angeles, and State of California.

Whereas, the parties hereto are the owners of certain property including bank accounts, securities, partnership interests and other property, all more fully described in Schedule "A" attached hereto and hereby made a part hereof, all of such property being the Community Property of the parties hereto and acquired by them since their marriage on August 30, 1940, and during their residence in the State of California; and

Whereas, the parties hereto desire to vest in each other an equal, existing and separate but undivided interest in and to all of such property and in all of the income derived therefrom and in all property acquired with such income, or the rents, profits and issues thereof, all as tenants in common as defined in the Civil Code of California, Sections 685 and 686; and

Whereas, the parties hereto desire to vest in each other an equal, existing and separate but undivided interest in and to all income and other property derived by either or both of them as the result of their labor or the products of their minds, all as tenants in common as hereinbefore defined;

Now Therefore, the parties hereto, in consideration of the love and affection which each bears to

Now, Therefore, the parties hereto, in consideration of the love and affection which each bears to the other, do as of the date hereof, give, grant and convey unto each other such interests in and to all

of such property as will immediately transmute such property ownership into tenants in common, as hereinbefore defined, and vest in them an equal, existing and separate but undivided interest therein; and do as of the date hereof terminate all of their interests therein which may be inconsistent with such interests as tenants in common and do further agree to execute any and all instruments which may be necessary to formally record such Tenancy in common.

The parties hereto do hereby further agree that all income and other property derived by either or both of them as the result of their labor or the products of their minds shall be received by them as tenants in common, as hereinbefore defined, and not as Community Property as defined in the Civil Code of California, Section 687 or Sections 161a and 164.

The parties hereto join in the execution of this agreement for the purpose of making and consenting to such gifts, grants, conveyances and transmutation and accepting such tenancy in common interests as their respective equal, existing and separate but undivided interests.

In Witness Whereof, the parties hereto have hereunder set their hands the day and year first herein written.

/s/ BRYANT ESSICK,

/s/ JEANETTE MARIE ESSICK.

State of California and
County of Los Angeles—ss.

On this 16th day of November, 1943, before me,

the undersigned, a Notary Public, in and for said County and State, residing therein, duly commissioned and sworn, personally appeared, Bryant Essick and Jeanette Marie Essick, his wife, known to me to be the persons whose names are subscribed thereto and acknowledged to me that they executed the within instrument.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ C. L. FALLACKSON,

Notary Public in and for said County and State.
Schedule "A"

(a) A one-half ($1\frac{1}{2}$) general partnership interest in that certain business known as Essick Machinery Company and as Essick Manufacturing Company, operated as a partnership, with its principal office located at 1950 Santa Fe Avenue, Los Angeles, California.

(b) 668 shares (now in name of Jeanette Essick) and 10 shares (now in name of Bryant Essick) of the corporate stock of West Coast Pipe and Steel Company, a California Corporation.

(c) Deposit Accounts as listed below: Bank and Branch: Security First National Trust and Savings Bank, Vernon Branch. Type of Account: Commercial. In the Names of: Bryant Essick or Jeanette Marie Essick. Balance as of the first day of October, 1943, \$3,668.40.

[Stamp]: Bureau Record.

West Coast Pipe and Steel Company
1950 Santa Fe Aven., Los Angeles, California
Balance Sheet

October 30, 1943

Assets

Cash in Bank				205.84
Receivables				
Accounts—Doubtful		10517.11		
Notes—Doubtful		529.80		11046.91
Suspense a/c (Prepaid Bldg. Repairs)				4053.62
[Handwritten marginal note] : Largely bad and uncollected.				
Real Estate				
West Coast				
Land		31971.21		
Improvements	19957.09			
Less Reserve	12092.87	7864.22	39835.43	
1950 Santa Fe				
Land		10500.00		
Improvements	22355.46			
Less Reserve	444.48	21910.98	32410.98	
2428 East 14th St.				
Land		6000.00		
Improvements	8000.00			
Less Reserve	x x	8000.00	14000.00	
2427 East 15th St.				
Land		6000.00		
Improvements	15000.00			
Less Reserve	x x	15000.00	21000.00	35000.00
Given				
Land		3000.00		
Improvements	200.00			
Less Reserve	x x	200.00	3200.00	
La Quinta				
Land			687.19	111133.60
Investments				
Sundry Stocks				2650.50
Total Assets				129090.47

[Handwritten marginal note] : Any of this contributed by partnership? No.

Liabilities

Payroll Taxes		348.42		
Accounts Payable		None		
Trust Deed Notes				
1950 Santa Fe	23000.00			
14th & 15th Sts.	33911.22	56911.22	57259.64	
Capital	136000.00			
Less Deficit	64169.17			
Net Worth			71830.83	

Total Liabilities & Net Worth

129090.47

[Stamp] : Bureau Record.

Balance Sheet
Essick Manufacturing Company
A Partnership

December 31, 1942—Annual

Assets			
Current			
Cash		150.00	
Bank		54996.35	
Accounts Receivable	113103.04		
Notes Receivable	5756.51		
	<u>118859.55</u>		
Less Reserve for Bad & Doubtful	7085.56	111773.99	
Inventories	<u>109673.42</u>		
Net Current Assets			276593.76
Fixed			
Trucks & Autos	11926.57		
Less Reserve for Depr.	9236.48	2690.09	
	<u> </u>		
Jigs, Dies & Tools		43.91	
Patterns		355.00	
Machinery & Equipment	59322.18		
Less Reserve for Depr.	10784.82		
	<u> </u>		
		48537.36	
Furniture & Fixtures	5178.57		
Less Reserve for Depr.	1204.01	3974.56	
	<u> </u>		
Total Fixed Assets			55600.92
First Trust Deeds Receivable			33500.00
Total Available Assets			365694.68
Contingent			
Leasehold Improvements	3372.39		
Less Reserve for Amortization	1973.17	1399.22	
	<u> </u>		
Leasehold Deposits		545.00	
Insurance Deposits		957.64	
Prepaid Excise Tax		128.97	
Prepaid Insurance		1456.68	
		<u> </u>	
Total Contingent Assets			4487.51
Total Assets			<u>370182.19</u>
Liabilities			
Payables Owing			
Accounts Payable		7389.34	
Taxes Owing			
Accrued Payroll Taxes	5402.67		
Accrued Sales Tax	1403.62		
Accrued Compensation Ins.	536.30	7342.59	
	<u> </u>		
Total Current Liabilities			14731.93
Special Reserves			
Reserve for Advertising	1000.00		
Reserve for Guaranties	5000.00		
Reserve for Fed. Inc. Tax	94487.00	100487.00	
	<u> </u>		
Handwritten marginal note] : This is personal but was paid by partners.			
Total Owing plus Reserves			115218.93
Net Worth December 31, 1942			254963.26
Total Liabilities and Net Worth			370182.19
Stamp] : Bureau Record.			

Balance Sheet
Essick Manufacturing Company
A Partnership

December 31st, 1943—Annual

[Handwritten marginal note] : No balance sheet available as of 11/16/43

Assets

Current Assets

Cash		200.00
Bank		33385.61
Accounts Receivable	127984.25	
Notes Receivable	13963.48	

Total	141947.73	
Less Reserve for Bad & Doubtful	6917.31	135030.42

Inventory		100220.53
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Net Current Assets		268836.56
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Investment Assets

First Trust Deeds Receivable		67060.69
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[Handwritten marginal note] : From West Coast Pipe & Steel Co.

Fixed Assets

Trucks & Autos	12935.82	
Less Reserve	9405.29	3530.53

Machinery & Equipment	72205.96	
Less Reserve	23963.43	48442.53

Furniture & Fixtures	7892.92	
Less Reserve	1643.98	6248.94

Net Fixed Assets		58222.00
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Total Available Assets		394119.25
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Contingent Assets

Leasehold Improvements	4297.78	
Less Reserve	3179.47	1118.31
Leasehold Deposits		410.00
Insurance Deposits		1107.43
Prepaid Excise Tax		128.97
Unexpired Insurance		1278.25

Total Contingent Assets		4042.96
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Total Assets		398162.21
Liabilities		

Payables Owing

Accounts Payable	19407.77	
Payroll Payable	4771.07	
Notes Payable	None	
Total Payables		24178.84

Taxes Owing

Accrued Payroll Taxes	17864.09	
Accrued Sales Taxes	2505.98	
Accrued Compensation Taxes	866.76	

Total Taxes		21236.83
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Total Current Liabilities		45415.67
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Special Reserves

For Advertising		1000.00
For Guaranties		7165.14
For Estimated Income Taxes		
to December 31, 1943	31803.90	

Handwritten marginal note] : This is personal but was paid by partners and hence affected value of the gift.

Less US Treasury "C" Certificates on hand	30000.00	1803.90
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Total Special Reserves		9969.04
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Total Liabilities & Sp. Reserves		55384.71
Net Worth		342777.50

Total Liabilities and Net Worth		398162.21
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Stamp] : Bureau Record.

Admitted Sept. 19, 1949.



PLAINTIFF'S EXHIBIT No. 2

United States of America

[Emblem]

Treasury Department

Washington

May 23, 1949.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Gift Tax Return for 1941 (with affidavit and schedules attached), filed by Bryant Essick, Los Angeles, California, on file in this Department.

(Space for use of Collector)

ORIGINAL UNITED STATES GIFT TAX RETURN

(Space for use of Bureau)

CALENDAR YEAR 19 41

(To be filed in duplicate with the Collector of Internal Revenue for the donor's district not later than the 15th day of March following the close of the calendar year)

DONOR Bryant none Essick
(Given name) (Middle name or initial) (Surname)
ADDRESS 3756 Effingham Place L.A. Calif
CITIZENSHIP American
RESIDENCE 3756 Effingham Place

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, any transfer exceeding \$4,000 in value (or regardless of value if in trust or a future interest) as follows? (Answer "Yes" or "No.")

1. By the creation of a trust (or the making of additions to a trust previously created) for the benefit of a person or persons, other than yourself, and with respect to which you retain no power to revoke the beneficial title to the property in yourself or to change the beneficiaries or their proportionate benefits, or by relinquishing every such power that was retained in a previously created trust... no;
2. By permitting another to withdraw funds from a joint bank account which were deposited by you... no;
3. By the purchase of property (including the proceeds of a previous sale) for the use of a beneficiary (other than yourself) and with respect to which you retained no power to revoke the economic benefits or to change the beneficiaries or their proportionate benefits... no;
4. By conveying title to another and yourself as joint tenants or to your wife or husband and yourself as tenants by the entirety... no;
5. By any other method, direct or indirect... yes.

If the answer is "Yes" to any of the foregoing, such a transfer should be fully disclosed under schedule A.

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

Total included amount of gifts for year (item c, schedule A) \$ 39189.37

Total deductions for charitable, public, and similar gifts for year (item c, schedule B) \$

Specific exemption claimed (see section 10 of instructions) 39189.37

Total deductions (item 2 plus item 3) 39189.37

Amount of net gifts for year (item 1 minus item 4) \$ none

COMPUTATION OF TAX (see section 14 of instructions)

Amount of net gifts for year (item 5, above) \$ none

Total amount of net gifts for preceding years (item c, schedule C) \$ none

Total net gifts (item 1 plus item 2) \$

Tax computed on item 3 \$

Tax computed on item 2 \$

Tax on net gifts for year without addition of defense tax (item 4 minus item 5) \$ none

Defense tax (see second and third paragraphs of section 14 of instructions) \$

Total tax payable for year (item 6 plus item 7) \$ none

AFFIDAVIT OF PERSON FILING RETURN

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Federal gift tax law and regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedule A was made by me (the donor) during said calendar year.

Sworn to and subscribed before me this 3d day of April, 1941
C. H. Jackson Notary Public
My Commission Expires Sept. 24, 1942
(Signature of donor/executor/other person) Bryant Essick
(Address of person filing return) 3756 Effingham Pl. L.A. Calif

AFFIDAVIT OF PERSON PREPARING RETURN

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

Sworn to and subscribed before me this 3d day of April, 1941
C. H. Jackson Notary Public
My Commission Expires Sept. 24, 1942
(Signature of person preparing return) H. J. Rinnell
(Address of person preparing return) 8933 Dalton Ave

Schedule A—Total Gifts During Year
(see sections 5, 6, 7, 9, 11, and 15 of instructions)

Item No.	Description of Gift, Motive, and Donee's Name and Address	Date of Gift	Value at Date of Gift
----------	---	--------------	-----------------------

	Direct gift to my wife, Jeanette Marie Essick at 3756 Effingham Place, Los Angeles, Calif.	3-1-41	\$43189.37
--	---	--------	------------

One half of my interest in the Essick Machinery Company, 1950 Santa Fe Ave., Los Angeles, Calif. a partnership as per net worth as shown on the attached Balance Sheet, Feb. 28, 1941.

Values as shown on the Balance Sheet are taken from the books of the Company and are cost values.

Profit and Loss Statement for the past five years are attached herewith.

(a)	Total	\$43189.37
-----	-------------	------------

(b)	Less total exclusions not exceeding \$4,000 for each donee (except gifts in trust or of future interests)	4000.00
-----	---	---------

(c)	Total included amount of gifts for year	\$39189.37
-----	---	------------

[Marginal note in pencil : accepted JWC]

Schedule B—Deductions for Charitable, Public, and Similar Gifts
During Year (see sections 8, 9, and 12 of instructions)
[No data shown]

Schedule C—Returns, Amounts of Specific Exemption, and Net
Gifts for Preceding Years (subsequent to June 6, 1932)
[No data shown]

Name Bryant Essick
Street Address 3756 Effingham Place
City Los Angeles, State Calif.

Date : Apr. 3, 1942

Collector of Internal Revenue,
Los Angeles, California.

Sir:—

I hereby solemnly swear (or affirm) that my delinquency in filing return of Gift Tax on Form 709 for the period year of 1941

as required by the Act of 1940 was due to no intent to violate the law but was occasioned by being overlooked prior to Mar. 15, 1942. This was in no way overlooked intentionally and trust that you will accept same

I, therefore, respectfully request that this statement be accepted as satisfactory and that no further action be taken against me in the matter.

/s/ Bryant Essick,
3756 Effingham Place,
Los Angeles.

Subscribed and sworn to before me this 3d day of April 1942.

Seal /s/ C. L. Tallackson.

Notary Public or Deputy Collector

My Commission Expires Sept. 25, 1945.

[Stamped] : Received Apr. 6, 1942, Coll. Int. Rev. Los Angeles, Cal.

Essick Machinery Co.
A Partnership
Balance Sheet
Feb. 28, 1941

Assets

Cash on Hand		30.71
Accounts Receivable	25264.91	
Notes Receivable	41193.31	
	66458.22	
Less Reserve for Bad Debts	5965.06	60493.16
Merchandise Inventory		132619.65
Total Current Assets		193143.52
Trucks & Autos	9809.75	
Machinery & Equipment	23519.13	
Furniture & Fixtures	3014.96	
Patterns	355.00	
	36698.84	
Less Reserve for Depreciation	11936.22	24762.62
Real Estate & Building		34047.26
Deposits, Rental & Insurance		1206.87
Leasehold Improvements		1593.05
Prepaid Insurance		671.34
Total Assets		255424.66

Liabilities

Cash in Bank	1206.83	
Accounts Payable	49174.06	
Notes Payable	30000.00	
	<hr/>	
Total Current Liabilities		80380.89
Accrued Sales Tax	1038.34	
Accrued Pay Roll Taxes	1223.78	
Reserve for Advertising	24.14	2286.26
	<hr/>	<hr/>
Total Liabilities		82667.15
Net Worth, Dec. 31, 1940	183341.97	
Loss for Jan. & Feb., 1941	10584.46	
	<hr/>	
Net Worth, Feb. 28, 1941		172757.51
		<hr/>
Total Liabilities & Net Worth		255424.66
		<hr/> <hr/>

Note: Newman Essick and Bryant Essick are equal partners.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 71, inclusive, contain the original Complaint for Recovery of Federal Gift Taxes; Motion of Defendant for Summary Judgment and for Dismissal with Prejudice; Plaintiff's Motion for Summary Judgment; Affidavit of Plaintiff Bryant Essick, in Support of His Motion for Summary Judgment; Answer; Supplemental Affidavit of Bryant Essick in Support of His Motion for Summary Judgment; Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Order Extending Time to Docket Appeal and Designation of Record on Appeal which, together with Original Plaintiff's Exhibits Nos. 1 and 2, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 10 day of March, A.D. 1950.

EDMUND L. SMITH,

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12497. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Bryant Essick, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 11, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12497

UNITED STATES OF AMERICA,
Appellant,
vs.

BRYANT ESSICK,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

On appeal from the judgment in the above entitled action, the appellant will urge and rely upon the following points, to wit:

I.

The Trial Court erred in concluding, as a matter of law (Conclusions of Law, Nos. 4 and 5), that

the November 16, 1943, conversion of post-1947 type California community property into property held by the same spouses as tenants in common, did not involve a taxable gift from the taxpayer to his wife within the meaning of Section 1000(d), or of any other provisions, of the Internal Revenue Code.

II.

The Trial Court erred in concluding, as a matter of law (Conclusion of Law No. 5), that to the extent that Section 86.2(c) of Treasury Regulations, 108 purports to make taxable the conversion into tenancies in common of post-1927 community property by spouses, subsequent to 1942, it is invalid as applied to the appellee and his wife under the facts involved in this case.

III.

The Trial Court's Conclusions of Law numbered 6 and 7 are supported by neither the facts nor the law.

IV.

In the alternative, appellant contends that the March 1941 transfer by the taxpayer to his wife of a California community interest in his separate property was not a completed gift to her of one-half of such separate property within the meaning of the provisions of Section 1000 of the Internal Revenue Code, as such section existed on said date, and as construed by the Supreme Court, since he re-

tained until November 16, 1943, the exclusive right and power to manage, control and possess his wife's half, and to pay his personal and separate debts in part therewith, without her consent. The transfer did not become a taxable gift under said Section 1000 (as it existed in 1941) until November 16, 1943, when the donor for the first time relinquished and transferred to the donee his said rights and powers over her half.

As a matter of law, the Trial Court's Finding 6 and Conclusion No. 3, to the contrary, are erroneous.

V.

If by the words "equal community property interest," as used in Finding 5, the Trial Court meant that the wife, by such March, 1941, grant, personally acquired exercisable rights and powers over and in respect of her undivided one-half of such newly created community property, equal to those of her husband, then such Finding is supported by neither evidence nor law.

There is no evidence or law to support the Trial Court's Finding 7 to the effect that the community interest transferred to the wife on March 1, 1941, had a fair market value equal to the community property interest retained by the taxpayer.

There is no evidence or law to support such Finding 7 to the effect that the undivided community interest then acquired by the wife had any market value whatever, either fair or otherwise.

There is no evidence or law to support such Find-

ing 7 to the effect that the wife's said community interest, as such, was marketable.

Dated: March 9, 1950.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL,
Assistant U.S. Attorney.

By /s/ E. H. MITCHELL,
Attorneys for Appellant.

[Endorsed]: Filed March 11, 1950.

No. 12498

United States
Court of Appeals
for the Ninth Circuit.

GEORGE T. GOGGIN, as Receiver of the Estate
of Salsbury Motors, Inc., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION,

Appellee.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

FILED
JUN 16 1950

HALL P. O'BRIEN,
Clerk

No. 12498

United States
Court of Appeals
for the Ninth Circuit.

GEORGE T. GOGGIN, as Receiver of the Estate
of Salsbury Motors, Inc., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION,

Appellee.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

GENDEL & RASKOFF,

810 James Oviatt Bldg.,

617 S. Olive St.,

Los Angeles 14, Calif.

For Appellee:

HUGO A. STEINMEYER,

ROBERT H. FABIAN,

650 S. Spring St.,

Los Angeles 14, Calif.

In the District Court of the United States, Southern
District of California, Central Division

No. 45207-B

In Proceedings for an Arrangement
In the Matter of:

SALSBURY MOTORS, INC., a California Corporation,

Debtor.

PETITION OF DEBTOR

To the Honorable Judges of the District Court of
the United States, for the Southern District
of California, Central Division:

This petition of Salsbury Motors, Inc., a California corporation, hereinafter called "Debtor," having its principal place of business in the City of Pomona, County of Los Angeles, State of California, and engaged in the business of manufacturing and selling motor scooters, gasoline engines, in-plant trucks, and related products, respectfully represents:

I.

Debtor, a California corporation, has had its principal place of business in the County of Los Angeles, State of [2*] California, within the above jurisdictional district for the six months immediately preceding the filing of this petition.

*Page numbering stamped at bottom of page of original Transcript of Record.

II.

No bankruptcy proceedings initiated by a petition by or against Debtor are now pending to the Debtor's knowledge and belief.

III.

Debtor is insolvent and proposes an arrangement with its creditors pursuant to the provisions of Chapter XI of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," as amended (hereinafter referred to as the "Bankruptcy Act").

The provisions of the arrangement proposed by Debtor are set forth in the Plan of Arrangement attached hereto marked Exhibit 1 and by this reference incorporated herein as though set forth in full.

IV.

The creditors affected by the Plan of Arrangement are divided into three classes: Bank of America National Trust and Savings Association as the holders of secured notes of the Debtor; Debtor's unsecured creditors having claims in excess of \$500; and Northrop Aircraft, Inc., as the holder of unsecured notes of the Debtor.

V.

The schedule hereto annexed marked Schedule A and verified by the oath of Debtor's vice-president contains a full [3] and true statement of all its debts at June 30, 1947, and so far as it is possible to ascertain, the names and places of residence of

its creditors and such other statements concerning said debts as are required by the provisions of the Bankruptcy Act. As soon as possible after the filing of this petition Debtor will file supplemental schedules bringing such schedules down to the date of filing of this petition.

VI.

The schedule hereto annexed, marked Schedule B, and verified by the oath of Debtor's vice-president, contains an accurate inventory of all its property, real and personal at June 30, 1947, and such further statements concerning said property as are required by the provisions of the Bankruptcy Act. As soon as possible after the filing of this petition Debtor will file supplemental schedules bringing such schedules down to the date of filing of this petition.

VII.

The schedule hereto annexed, marked Schedule C, sets forth a statement of the executory contracts of Debtor.

VIII.

The statement hereto annexed, marked Exhibit 2, and verified by the oath of the Debtor's vice-president, contains a full and true statement of its affairs as required by the provisions of the Bankruptcy Act.

IX.

That hereto annexed, marked Exhibit 3, certified by [4] an assistant secretary of the Debtor, is a

full, true and correct copy of a resolution adopted by Debtor's Board of Directors on August 19, 1947, authorizing the filing of this petition.

X.

Debtor's creditor, Bank of America National Trust and Savings Association, shortly before the filing of this petition exercised its alleged right of set-off and applied the money in Debtor's bank accounts with said bank to the indebtedness owing by Debtor to said bank represented by promissory notes of the Debtor aggregating approximately \$750,000 in principal amount, which are secured by a trust deed on buildings and a part of the land constituting Debtor's manufacturing plant in Pomona, California. Debtor has consequently been compelled drastically to curtail its operations and intends to stop all manufacturing operations not later than Friday, August 22, 1947, and Debtor does not propose to incur any additional indebtedness without the approval of the Court in this proceeding, except indebtedness necessary to the preservation of Debtor's properties. However, Debtor has been negotiating with prospective purchasers of Debtor's business and assets and is hopeful that during the pendency of these proceedings Debtor's Plan of Arrangement submitted herewith may be consummated.

Wherefore, Debtor prays that proceedings may be had on this petition in accordance with the provisions of Chapter XI of the Bankruptcy Act and without limitation of such general power:

1. That the Court accept this petition for the purpose of subjecting the Debtor, its property and its creditors to the [5] jurisdiction of this Court;

2. That during the pendency of these proceedings all creditors and other persons be enjoined from instituting or prosecuting, or continuing the prosecution of any actions, suits, or proceedings, at law or in equity, against Debtor, and from levying any attachments, executions or other writs or processes upon or against Debtor or any of its assets or properties, or from taking or attempting to take into their possession any of the assets or properties of Debtor;

3. That during the pendency of these proceedings Debtor be authorized to remain in possession of its properties, and to do all things necessary to carry out the provisions of the Plan of Arrangement if confirmed, subject, however, at all times to the regulation and control of this Court;

4. That notice be given to creditors fixing a date for the meeting of creditors;

5. That this petition be accepted by the Court as Debtor's application for the confirmation of the arrangement proposed by the Plan of Arrangement, and that the hearing upon said application for confirmation and of any objections thereto be set at such time as may appear appropriate to the

6. That Debtor be ordered to print and mail Court;

to the persons entitled thereto under Chapter XI of the Bankruptcy Act a copy of the notice of meeting of creditors, said notice to be in a form approved by this Court and annexed to a copy of said order, and to be accompanied by a copy of the Plan of Arrangement and a summary of the Debtor's assets and liabilities as shown by the schedules annexed to this petition as the same may be hereafter supplemented;

7. That Debtor shall have such other and further relief [6] as shall be necessary and proper in the premises.

Dated: August 20, 1947.

SALSBURY MOTORS, INC.,

By /s/ E. F. SALSBURY,
Vice-President.

O'MELVENY & MYERS and
By /s/ GRAHAM L. STERLING, JR.,
Attorneys for Petitioner. [7]

State of California,
County of Los Angeles—ss.

E. F. Salsbury, being duly sworn, deposes and says:

That the Petitioner in the within-entitled action is a corporation, and that affiant is an officer thereof, to wit, the Vice-President, and makes this verification for and on behalf of said corporation.

That affiant has read the foregoing Petition and

knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

/s/ E. F. SALSBUURY.

Subscribed and sworn to before me this 20th day of August, 1947.

[Seal] /s/ RUBY E. SLOANAKER,
Notary Public in and for the County of Los Angeles, State of California. [8]

(For Bankrupt or Debtor engaged in business)

(Instructions: Each question herein must be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet properly identified and made a part hereof, should be used and attached. If the Bankrupt or Debtor is a partnership or a corporation, the answers should be made on behalf of such partnership, or corporation, and the statement should be verified by a member of the partnership or a duly authorized officer of the corporation.)

To the Honorable..... Judge of the District Court of the United States for the
..... District of..... Division:

The Petition of Salsbury Motors, Inc., of 1201 E. Lexington Ave., City of Pomona in the County of Los Angeles, District of the State of California, and by occupation manufacturer of motor scooters, turret trucks, small engines.

Respectfully Represents:

1. That the Petitioner is now engaged in the business of manufacturing motor scooters, etc., under the name of Salsbury Motors, Inc., at the address 1201 E. Lexington Ave., Pomona, Calif.

That the Petitioner commenced such business on or about the date Dec. 7, 1944.

That during the six years immediately preceding the filing of the original Petition herein, the Petitioner was engaged in the businesses, at the addresses and with the partners, joint adventurers or other associates, as follows:

From (date):	To (date):	Nature of Business:	Address of Business:
Nov. 30, '42	Dec. 7, '44	Aircraft	4550 E. 50th St., Los Angeles, Calif.
Dec. 7, '44	July 1, '46	Motor Scooters, etc.	4464 District Blvd., Los Angeles, Calif.
July 1, '46	Present	Motor Scooters, etc.	1201 E. Lexington Ave., Pomona, Calif.

2. That during the two years immediately preceding the filing of the original Petition herein, the books of account and records of the Petitioner have been kept by or under the supervision of:

From (date):	To (date):	Name of Bookkeeper:	Address of Bookkeeper:
8-1-45	12-31-46	G. R. Case	1201 E. Lexington Ave., Pomona, Calif.
1-1-47	8- -47	R. J. Pagen	1001 E. Broadway, Hawthorne, Calif.

That during the two years immediately preceding the filing of the original Petition herein, the books of account and records of the Petitioner have been audited by:

Date of Audit:	Name of Auditor:	Address of Auditor:
12-31-44	Arthur Young & Co.	629 S. Hill St., Los Angeles, Calif.
7-31-46	Ernst & Ernst	548 S. Spring St., Los Angeles, Calif.

That the books of account and records of the Petitioner are now in the possession of R. J. Pagen, at the address 1001 E. Broadway, Hawthorne, Calif.

3. That the dates, and the names and addresses of the persons to whom the Petitioner has issued financial statements, (including those to mercantile and trade agencies) upon his business and property within the two years immediately preceding the filing of the original Petition herein, are as follows:

Date:	Name of Concern:	Nature of Business:	Address:
Monthly	Bank of America National Trust & Savings Association	Banking	660 S. Spring St. Los Angeles, Calif.

4. That the last inventory of the Petitioner's property was taken on the 8th day of December, 1946 by (or under the supervision of) G. R. Case, address 1201 E. Lexington St., Pomona, Calif., and the said inventory was taken at the lower of cost or market; and the amount of said inventory was \$669,864.08.

That the next prior inventory to the last inventory taken of Petitioner's property was taken on the 31st day of July, 1946, by (or under the supervision of) G. R. Case, address 1201 E. Lexington St., Pomona, Calif., and the said inventory was taken at the lower of cost or market; and the amount of said inventory was \$306,680.83.

That the records of the two last inventories above referred to are in the possession of G. R. Case, address 1201 E. Lexington St., Pomona, Calif. Note: An inventory is being taken as of 7-31-47.

5. That the dates, sources, particulars and amounts of income received by the Petitioner during each of the two years immediately preceding the filing of the original Petition herein, other than from the operation of Petitioner's business, are as follows: None

6. That the last filing of a U.S. Federal Income Tax Return by the Petitioner was for the year 1946 and was filed by the Petitioner at the office of U.S. Collector of Internal Revenue at Los Angeles.

That the last filing of a State Income Tax Return by the Petitioner was for the year 1946 and was filed by the Petitioner at the office of Franchise Tax Commissioner of the State of California at Los Angeles.

7. That within the two years immediately preceding the filing of the original Petition herein, the Petitioner maintained bank accounts, alone or together with any other person, and in Petitioner's own name or any other name, as follows:

Name and Address of Bank:	Account in Name of:	Names of Persons authorized to make withdrawals:
Bank of America National Trust & Savings Association 660 S. Spring St., Los Angeles	Salsbury Motors, Inc.	*Foster Salsbury
Bank of America National Trust & Savings Association Pomona		*G. R. Case George Gore R. J. Pagen C. N. Monson
First National Bank, Pomona		
* Not "authorized on First National Bank of Pomona		

That within the two years immediately preceding the filing of the original Petition herein, the Petitioner maintained safe deposit boxes or other depositories for Petitioner's securities, cash, or other valuables, as follows:
None

8. That the only property or properties held in trust by Petitioner for any other person are as follows:
None

9. That within the six years immediately preceding the filing of the original Petition herein, proceedings under the Bankruptcy Act have been brought by or against the Petitioner as follows:

None

That at the time of the filing of the original Petition herein, certain property of the Petitioner was in the hands of a receiver or trustee, as follows:

None

That within the two years immediately preceding the filing of the original Petition herein, the Petitioner made assignments of Petitioner's property for the benefit of creditors or general settlement with Petitioner's creditors, as follows:

None

10. That during the year immediately preceding the filing of the original Petition herein, the Petitioner made repayments of loans, as follows:

(Note: Give the name and address of the lender, the amount of the loan and when received, the amount and date when repaid, and, if the lender is a relative, the relationship. If the Bankrupt or Debtor is a partnership, state whether the lender is or was a partner or a relative of a partner, and if so, the relationship.)

Name & Address of Lender	Amount of Loan	Date Received	Paid Amount	Date
Bank of America National	\$100,000.00	1-46	\$100,000	2-46
Trust & Savings Assn.	\$150,000.00	1-47	\$150,000	3-47
660 S. Spring St.			\$100,000	4-47
Los Angeles, Calif.			\$ 4,500	2-47
			\$ 4,500	5-47
			\$ 4,500	8-47

11. During the year immediately preceding the filing of the original Petition herein, the Petitioner transferred or disposed of, other than in the ordinary course of business, the following assets or properties:

None

12. That during the year immediately preceding the filing of the original Petition herein, the Petitioner assigned accounts receivable as follows:

None

13. That during the year immediately preceding the filing of the original Petition herein, the Petitioner suffered losses from fire, theft or gambling as follows:

None

(If the Bankrupt or Debtor is a partnership or corporation the following additional questions should be answered.)

14. That during the year immediately preceding the filing of the original Petition herein, personal withdrawals, including loans, have been made by each member of the partnership, or by each officer, director or managing executive of the corporation, as follows:

None

15. (If the Bankrupt or Debtor is a Partnership) The names and addresses of the members of the partnership, comprising the Petitioner, are as follows:

None

(If the Bankrupt or Debtor is a Corporation) The names, titles or offices held, and addresses of the officers, directors and managing executive and of each stockholder holding twenty-five (25%) percent of the issued and outstanding stock of the corporation petitioner, are as follows:

Name:	Office Held or Percent of Stock Held :	Address :
Richard W. Millar	Chairman of the Board	e/o Northrop Aircraft, Inc. Hawthorne, Calif.
E. F. Salsbury	Vice-President-Director	e/o Salsbury Motors, Inc. Pomona, Calif.
G. R. Case	General Manager & Treasurer-Director	e/o Salsbury Motors, Inc. Pomona, Calif.
George Gore	Assistant Secretary	e/o Northrop Aircraft, Inc. Hawthorne, Calif.
La Motte T. Cohu	Director	5700 Avion Drive Los Angeles 45, Calif.
John K. Northrop	Director	e/o Northrop Aircraft, Inc. Hawthorne, Calif.
C. N. Monson	Director	e/o Northrop Aircraft, Inc. Hawthorne, Calif.

Salsbury Motors, Inc.
Bankrupt or Debtor
By: E. F. Salsbury, V.P.

Oath to Statement of Affairs

State of California,
County of Los Angeles—ss.

I, E. F. Salsbury, the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

By /s/ E. F. SALSBURY,
For Salsbury Motors, Inc.

Subscribed and sworn to before me this 20th day of August, 1947.

[Seal] /s/ RUBY E. SLOANAKER,
Notary Public in and for the County of Los Angeles, State of California. [14]

SUMMARY OF DEBTS AND ASSETS

(From the Statements of the Debtor
in Schedules A and B)

June 30, 1947

Schedule A 1—a

Wages\$ 38,842.05

Schedule A 1—b (1)

Taxes due United States..... 39,254.92

Schedule A 1—b (2)

Taxes due States..... 11,221.52

Schedule A 1—b (3)

Taxes due counties, districts and
municipalities 21,178.99

Schedule A 1—c (1)

Debts due any person, including
the United States, having prior-
ity by laws of the United States none

Schedule A 1—c (2)

Rent having priority..... 2,150.00

Schedule A 2

Secured claims..... 766,307.78

Schedule A 3

Unsecured claims..... 1,845,925.74

Schedule A 4

Notes and bills which ought to be
paid by other parties thereto... none

Schedule A 5

Accommodation paper..... none

Schedule A, total....\$2,724,881.00

Schedule B 1	
Real estate, buildings and ground improvements	\$ 307,272.31
Schedule B 2—a	
Cash on hand.....	13,919.72
Schedule B 2—b	
Negotiable and non-negotiable in- struments and securities.....	35,837.00
Schedule B 2—c	
Stocks in trade.....	916,527.38
Schedule B 2—d	
Household goods.....	none
Schedule B 2—e	
Books, prints and pictures.....	none
Schedule B 2—f	
Horses, cows and other animals...	none
Schedule B 2—g	
Automobiles and other vehicles...	3,889.32
Schedule B 2—h	
Farming stock and implements...	none
Schedule B 2—i	
Shipping and shares in vessels....	none
Schedule B 2—j	
Machinery, fixtures and tools.....	492,123.54
Schedule B 2—k	
Patents, copyrights, and trade- marks, license rights.....	12,499.01
Schedule B 2—l	
Other deferred charges.....	7,277.49
Schedule B 3—a	
Debts due on open accounts net of reserve \$4,459.34.....	306,342.89

Schedule B 3—b

Policies of insurance and prepaid taxes of \$10.69.....	4,430.51
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Schedule B 3—c

Unliquidated claims, royalties paid in advance.....	15,350.30
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Schedule B 3—d

Deposits of money in banks and elsewhere	47,487.70
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Schedule B 4

Property in reversion, remainder, expectancy or trust.....	none
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Schedule B 5

Property claimed as exempt.....	none
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Schedule B 6

Books, deeds and papers.....	none
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Schedule B, total....\$2,162,957.17

/s/ E. F. SALSBUURY, V.P.,
For Salsbury Motors, Inc.,
Petitioner.

[Endorsed]: Filed Aug. 20, 1947. U. S. D. C.

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE UNDER SEC-
TION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on August 20, 1947, before the said Court the petition of Salsbury Motors, Inc., a corporation, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Hugh L. Dickson, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Salsbury Motors, Inc., a corporation, shall attend before said referee on August 27, 1947, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Leon R. Yankwich, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on August 20, 1947.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ F. BETZ,
Deputy Clerk.

[Endorsed]: Filed Aug. 20, 1947. U. S. D. C.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable the Judges of the United States
District Court in and for the Southern District
of California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy, to
whom the above-entitled proceedings were referred,
do hereby certify:

1. The Petition of Salsbury Motors, Inc. under
Chapter XI of the Bankruptcy Act was duly filed
on August 20, 1947, and thereafter George T. Gog-
gin was duly appointed and qualified as Receiver
in said proceedings.

2. On December 8, 1947, Bank of America filed
its proof of partially secured debt in this proceed-
ing.

3. On February 19, 1948, Northrop Aircraft,
Inc., filed its proof of claim in this proceeding.

4. On or about May 13, 1948, Receiver George
T. Goggin filed objections to the claim of Northrop
Aircraft, Inc., in this proceeding.

5. On July 16, 1948, Bank of America filed a
motion for leave to file petition for intervention and
answer to objections [36] of Receiver to claim of
Northrop Aircraft, Inc.

6. On July 26, 1948, Receiver George T. Goggin
filed an answer to the motion described in Para-
graph 5 above.

7. On August 5, 1948, your Referee signed an order granting leave to Bank of America to intervene and answer Receiver's objections to the claim of Northrop Aircraft, Inc., and pursuant to said order, said petition to intervene and answer were filed.

8. On July 30, 1948, your Referee signed an order confirming Debtor's Second Amended Plan of Arrangement.

9. On June 30, 1948, George T. Goggin, Receiver, filed in this proceeding a "Petition of Receiver for Order Subordinating Claims of Bank of America."

10. On January 20, 1949, George T. Goggin, Receiver, filed in this proceeding a document entitled, "Supplement to Petition of Receiver for Order Subordinating Claims of Bank of America."

11. Orders to show cause were duly issued against Bank of America National Trust and Savings Association on the basis of the petitions described in Paragraphs 9 and 10 above, which orders came on for hearing before your Referee on March 2, 1949.

12. At the hearing on March 2, 1949, Respondent Bank of America National Trust and Savings Association filed a document entitled, "Response to Order to Show Cause Re Petition of Receiver for Order Subordinating Claims of Bank of America National Trust and Savings Association."

13. Your Referee on March 2, 1949, heard arguments and statements of counsel and indicated orally from the bench his opinion that the Court had no jurisdiction to determine the controversy and that the objections set forth in the response of Bank of America National Trust and Savings Association described in [37] Paragraph 12 above should be sustained. Your Referee directed counsel for the Respondent Bank to prepare an appropriate order.

14. On March 4, 1949, George T. Goggin served and filed a document designated, "Notice of Motion by George T. Goggin, as Receiver, to Reconsider Ruling on Motion of Bank of America Objecting to the Jurisdiction of the Bankruptcy Court Re: Subordination Hearing" and Points and Authorities in support of said motion.

15. The motion of George T. Goggin, Receiver, for reconsideration described in Paragraph 14 above duly came on for hearing on March 18, 1949, and your Referee heard arguments and statements of counsel and indicated orally from the bench that his previous ruling would stand.

16. On March 18, 1949, Respondent Bank of America submitted a form of order designated, "Order on Petition of Receiver for Order Subordinating Claims of Bank of America and on Supplemental Petition Thereto."

17. On March 19, 1949, at 9:00 a.m. George T. Goggin, Receiver, filed his formal "Objections of

Receiver to Proposed 'Order on Petition of Receiver for Order Subordinating Claims of Bank of America and on Supplement to Petition Thereto'."

18. Thereafter, on March 19, 1949, your Referee having read and considered the objections of Receiver described in Paragraph 17 above and being fully advised thereof, signed an "Order on Petition of Receiver for Order Subordinating Claims of Bank of America and on Supplemental Petition Thereto."

19. Attached to the objections of Receiver described in Paragraph 17 above as an exhibit thereto was a document designated, "Amended Petition of Receiver for an Order Subordinating Claims of Bank of America."

20. On April 6, 1949, on motion of George T. Goggin, Receiver, a hearing was had on the matters of the objections of [38] the Receiver described in Paragraph 17 above, and your Referee after hearing arguments of counsel determined that said objections be overruled.

21. On March 24, 1949, upon motion of George T. Goggin, Receiver, by his counsel, your Referee signed an "Order Extending Time Within Which to Petition for Review of 'Order on Petition of Receiver for Order Subordinating Claims of Bank of America and on Supplemental Petition Thereto'," extending the time to file said petition for review to April 14, 1949.

22. On April 7, 1949, upon motion of George T. Goggin, Receiver, your Referee further extended

the time within which to petition for review to April 24, 1949.

23. On April 20, 1949, George T. Goggin as Receiver and within the time allowed by your Referee filed a petition to review the said order described in Paragraph 19 above.

24. At the hearing on March 2, 1949, counsel for Receiver produced and discussed a document which he stated to be an amended petition, but said document was not served or filed at that time, nor was any notice of motion for leave to file any amended petition ever filed or served and no order was made thereon.

25. At the hearing on March 18, 1949, counsel for Receiver orally asked leave to file a document referred to as an amended petition, but said document was not served or filed at that time nor was any notice of motion for leave to file any amended petition ever filed or served, and no order was made thereon.

26. At the hearing on April 6, 1949, counsel for Receiver filed an amended petition after your Referee announced his ruling that the original order of March 19, 1949, would stand. No order was made with respect to said amended petition.

27. On November 23, 1948, your Referee signed an order [39] approving an Agreement of Indemnity by which Northrop Aircraft, Inc., agreed to indemnify the Receiver herein against certain specified liabilities.

28. On December 23, 1948, there was filed in this proceeding a release and satisfaction of the Agreement of Indemnity described in Paragraph 27 above.

29. The questions presented by the petition for review are:

a. Whether this Court under the provisions of the applicable statutes and of the order confirming the plan of arrangement has jurisdiction to determine controversies between creditors.

b. Whether the Receiver has any right, power or authority to seek to subordinate one creditor to another under the circumstances of this case.

c. Whether the petition to subordinate claim of Bank of America and supplement thereto state facts sufficient to justify the granting of the relief prayed for.

30. Your Referee is transmitting with his certificate on Review the following:

(1) Proof of claim of the Bank of America, dated September 8, 1947, and denominated as follows: "In Proceedings under Chapter XI, Section 322 of the Bankruptcy Act, Proof of Partially Secured Debt." By Reference—On Review.

(2) Notice of Motion of Bank of America to file petition for intervention and answer to objections by Receiver to claim of Northrop Aircraft, Inc., dated July 16, 1948.

(3) Answer of Bank of America to the aforesaid objections to the claims of Northrop Aircraft, Inc., filed pursuant to the order of August 5, 1948,

granting the motion of Bank of America National Trust and Savings Association for leave to file the petition for intervention and answer to objections by Receiver [40] to claims of Northrop Aircraft, Inc.

(4) The Debtor's Second Amended Plan of Arrangement under Chapter XI of the Bankruptcy Act.

(5) Order of the Referee in Bankruptcy dated July 30, 1948, confirming the Debtor's Second Amended Plan.

(6) Form of consent to said Second Amended Plan, as contained in the consent of Fairbanks-Morse & Co.

(7) The petition of George T. Goggin as Receiver dated July 30, 1948, for order subordinating the claims of Bank of America.

(8) Supplement to petition of George T. Goggin as Receiver for order subordinating claims of Bank of America, dated January 20, 1949.

(9) Order to show cause issued by the Referee re Bank of America dated July 30, 1948.

(10) Agreement of Indemnity of Northrop Aircraft, Inc., and order of court approving the same, dated November 19, 1948. (Signed November 23, 1948.)

(11) Document entitled, "Release and Satisfaction of Indemnity Agreement" dated December 23, 1948.

(12) Document filed by Bank of America dated March 2, 1949, designated, "Response to Order to Show Cause Re Petition of Receiver for Order

Subordinating Claims of Bank of America National Trust and Savings Association.”

(13) Reporter’s transcript of hearing on objections to claim of Bank of America, said hearing being held on March 2, 1949.

(14) Notice of Motion by George T. Goggin, as Receiver, dated March 4, 1949, to reconsider ruling on motion of Bank of America, objecting to the jurisdiction of the Bankruptcy Court re subordination hearing. [41]

(15) Points and Authorities dated March 7, 1949, in support of motion of George T. Goggin as Receiver to reconsider ruling of Referee on the jurisdiction point involving the subordination of Bank of America.

(16) Order of the Referee in Bankruptcy dated March 19, 1949, on petition of Receiver for order subordinating claims of Bank of America and on supplemental petitions thereto.

(17) Court reporter’s transcript of hearing on the motion of Receiver to reconsider ruling on motion of Bank of America, objecting to the jurisdiction of the Bankruptcy Court, re subordination hearing, said hearing being held on March 18, 1949.

(18) Objections of Receiver to proposed “Order on Petition of Receiver for Order Subordinating Claims of Bank of America, and on Supplement to Petition Thereto.”

(19) Court reporter’s transcript of hearing of April 6, 1949, overruling the objections of the Receiver to the proposed order on the Bank of Amer-

ica ruling and the refusal of the Referee to consider the amended petition.

(20) Original verified document dated March 18, 1949, entitled, "Amended Petition of Receiver for an Order Subordinating Claims of Bank of America." (Filed April 6, 1949.)

(21) Order of March 24, 1949, extending time within which to petition for review to the 14th day of April, 1949.

(22) Order of the Referee in Bankruptcy dated April 7, 1949, extending the time within which to petition for review.

(23) Petition for Review dated April 18, 1949.

(24) Proof of Claim filed by Northrop Aircraft, Inc., filed February 19, 1948.

(25) Objections of Receiver to Claim of Northrop dated May 12, 1948. [42]

(26) Answer of Receiver to motion of Bank for leave to file petition for intervention and answer to objections of Receiver to claim of Northrop Aircraft, Inc., dated July 26, 1948.

(27) Order of August 5, 1948, granting leave to Bank of America to intervene.

Dated this 16th day of May, 1949.

HUGH L. DICKSON,
Referee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 24, 1949, U.S.D.C.

Filed May 14, 1948. [43]

HUGH L. DICKSON,
Referee.

[Title of District Court and Cause.]

DEBTOR'S PROPOSED SECOND AMENDED
PLAN OF ARRANGEMENT

Salsbury Motors, Inc., proposed the following as its second amended plan of arrangement:

Article I

That creditors of petitioner be divided into classes and that the proposed classes be as follows:

Class A: Expenses of administration incurred since the filing of the original plan of arrangement, and such expenses as may be incurred in carrying out the second amended plan of arrangement, excluding any allowance to the attorney for the debtor, but including an allowance to the attorneys for the receiver, a reasonable fee to be allowed to the creditors' committee, fee to be allowed to George T. Goggin, as receiver and as disbursing agent under the second amended plan of arrangement, which disbursing agent's fee shall be the same as that paid to a trustee in bankruptcy, and a reasonable fee to the attorneys for George T. Goggin for services rendered to him as receiver or disbursing agent, after the order of confirmation, all as may be allowed by the above-entitled court. [88]

Class B: That there next be paid the claims in full of all creditors entitled to priority provided in the Acts of Congress relating to bankruptcy, as amended.

Class C: That there next be paid to all creditors holding securities, liens or claims against the assets

of debtor, being returned to the debtor, such amounts as the court may adjudge to be due said secured creditors.

Class D: That there shall next be paid to all other creditors of the above-named debtor, a pro rata dividend in the same manner and with like effect as if an order of adjudication were entered herein, and the trustee in bankruptcy was paying a partial or final dividend, said payments to be made at such time and in such amounts as the court may from time to time, upon the petition of any party in interest, order, and the court to reserve jurisdiction to determine the amount and validity of all claims and the classification of said claims and all objections that may be made in respect thereto with like effect and power as if the above-named debtor had been adjudicated a bankrupt, and George T. Goggin was the acting trustee in bankruptcy. That said George T. Goggin, as receiver and disbursing agent, shall have the right to object to any and all claims with like effect as if he were acting in the capacity of trustee in bankruptcy.

Article II

That there be transferred and returned to the debtor, all of the real property and personal property referred to and sought to be sold to the Brown-Bevis Company under an order confirming sale to them on February 16, 1948, free and clear of all liens, claims and rights of all secured or unsecured persons, and free and clear of all claims of dis-

chargeable and non-dischargeable debts except the lien in favor of a bank or lending institution in the amount of Five Hundred Fifty Thousand Dollars (\$550,000.00) hereinafter provided to be given as part of the execution of this second amended plan of arrangement, the court to enter an injunctive [89] order in the order approving the second amended plan of arrangement, protecting the debtor and the assets so returned to the debtor from suits, claims and liens in respect to said assets, and substituting in lieu thereof, for the parties asserting such claims, the right to file a claim with the above-entitled court and to be paid from the assets in the hands of George T. Goggin as receiver and disbursing agent, such amounts as the court may adjudge and determine.

Article III

That the debtor pay within five (5) days after the order confirming this second amended plan of arrangement has become final, any unpaid portion of the sum of Five Hundred Thousand Dollars (\$500,000.00) to George T. Goggin, as receiver or disbursing agent, in consideration of the approval of the second amended plan of arrangement and the delivery of the assets to the debtor free and clear of the claims of all persons.

Article IV

That there remain vested in George T. Goggin as receiver and disbursing agent, all causes of action, exclusive of the matters settled and compro-

mised as set forth in Article V herein, that could or would vest in George T. Goggin as trustee in bankruptcy in the event an order of adjudication were entered in the above-entitled proceeding, with full right and power to prosecute any and all causes of action, objections to claims, with full right to assert all offsets, counterclaims and affirmative claims, and any and all other rights that are now vested in him as receiver herein, or that would vest in him as a trustee in bankruptcy in the event of the entry of an order adjudging the above-named debtor to be bankrupt under the Acts of Congress relating to bankruptcy, and the appointment of George T. Goggin as trustee in bankruptcy. There shall remain vested in the creditors, such rights of actions and claims as they may have at this time against parties other than the debtor, exclusive of the matters settled and compromised in Article V herein, without limiting any of [90] the foregoing provisions contained in this Article V, the order confirming the second amended plan of arrangement and the acceptance by creditors of the same, shall be without prejudice as to the rights of creditors, receiver, his successor in interest, or the bankrupt estate, in connection with any and all proceedings or claims existing or now pending or that may be instituted against any person or corporation, except the rights, claims and demands settled and compromised under Article V herein.

Article V

Northrop Aircraft, Inc., hereinafter called

“Northrop,” has on file its claim against the debtor for \$1,345,531.72, which claim recites that the indebtedness of the debtor to Northrop as set forth therein has been subordinated to the indebtedness of said debtor to Bank of America National Trust & Savings Association by an agreement in writing between said bank and Northrop. The receiver herein has filed objections to the allowance of said claim and has asked for an order determining said claim should be subordinated to the claims of other creditors on file herein, and that Northrop is liable for all of the debts and obligations of the debtor. Northrop is willing to pay to George T. Goggin, as receiver, the consideration hereinafter described in full satisfaction of all claims and demands that any creditor may have against Northrop by reason of any and all liability incurred by the debtor. Bank of America National Trust & Savings Association, by reason of said subordination agreement executed by Northrop, asserts the right to receive dividends upon said claim of Northrop *pari passu* with other general claims against the debtor, until it has received satisfaction of the total amount of its present claim of \$198,818.44 (representing the unpaid balance remaining after allowance of the banker’s lien and setoff pursuant to order of Referee Dickson dated March 22, 1948), which position is resisted by the receiver and creditors, and a controversy exists in regard thereto. The receiver and creditors desire that dividends be [91] paid to creditors forthwith, without the Northrop claim participating therein, and without the receiver with-

holding funds in respect to said claim of Northrop against the debtor pending final determination of the above controversy in respect to dividends on said claim of Northrop against the debtor.

That therefore as part of this second amended plan of arrangement, and to be included in the order approving the same, the following settlement, releases and consideration to be paid will be effected:

1. George T. Goggin, as receiver, acting for and on behalf of all creditors herein and on behalf of the above estate, execute a release and compromise agreement releasing the debtor corporation and Northrop Aircraft, Inc., of all claims, demands of every character and nature, arising out of transactions between the creditors and the debtor herein.

2. In consideration of said release and in consideration of the creditors consenting to the second amended plan of arrangement, and in consideration of the court approving the same, Northrop Aircraft, Inc., will:

- (a) Forthwith pay to George T. Goggin, as receiver, and as the representative of creditors, the sum of Seventy-five Thousand Dollars (\$75,000.00) to be disbursed and paid to creditors as may be ordered paid by the court and as herein provided. Without affecting the generality of the release stated herein, it is agreed that the legal basis for the payment thereof is the settlement of the controversy of the "alter ego" contentions of the receiver.

- (b) Agree to the entry of an order subordi-

nating all of its right, title and interest in and to its said claim against the debtor to the claims of all other creditors herein; [92]

(c) In order to consummate the payment to creditors pending a determination of the above-mentioned controversy between George T. Goggin, as receiver herein, and the Bank of America National Trust & Savings Association, Northrop agrees to execute an indemnity agreement or surety bond, or to make a cash deposit, as it may elect, in such form and amounts as may be hereinafter approved by the above-entitled court after notice to the Bank of America, said indemnity agreement surety bond or deposit to indemnify George T. Goggin as receiver herein, and to be in the approximate sum of \$90,000,00, which is the amount estimated as the maximum amount payable as a dividend to the Bank of America upon Northrop's claim in the event that the Bank of America is adjudged by final order of the court to be correct in its contentions as above set forth. The indemnity liability of Northrop shall not be increased by reason of any increase in the claim of the Bank of America as above set forth, or by reason of any subordination of such claim of the Bank of America, in whole or in part, to the claims of other general creditors with respect to the funds in the hands of George T. Goggin, as receiver, or any part thereof, or as a result of any other obligation, controversy or settlement between said George T. Goggin and said Bank of America, which affect the status or the amount of said claim.

(d) Northrop will deposit, or include in said indemnity agreement, an amount equal to a sum required to be paid into the Referee's Salary Fund in the event a dividend is required to be paid on the Northrop claim.

(e) Northrop will deposit or include in said indemnity agreement, a provision agreeing to reimburse this estate or George T. Goggin, as receiver, for the actual cost [93] incurred and for his attorney's fees incurred in the prosecution or defense of the litigation with the Bank of America National Trust & Savings Association, involving the Northrop claim and the right to receive dividends thereon, said sums to be hereinafter fixed by the above-entitled court after a final order.

Article VI

The court to retain jurisdiction to carry out the plan of arrangement and to pass upon all controversies with creditors and third parties, with like effect as if an order of adjudication were entered herein and George T. Goggin was appointed trustee in bankruptcy.

Article VII

In the event any claims are in controversy, that the court reserve jurisdiction to direct George T. Goggin as receiver and disbursing agent, to hold and retain sufficient sums as the court may direct and order, to cover prospective dividends in respect to said disputed claims, and that pending a final deter-

mination of said controversy, dividends be paid to other creditors whose claims are not in dispute, in such amounts and at such times as the court may hereinafter order.

Article VIII

That in order to enable your petitioner to carry out this second amended plan of arrangement, it is necessary that your petitioner borrow from a bank or lending institution, the sum of Five Hundred Fifty Thousand Dollars (\$550,000.00) and to secure said loan by the giving of a trust deed and chattel mortgage creating a first lien against all of the assets being returned to the debtor under this second amended plan of arrangement. That the president and secretary of the debtor be authorized to execute a note, secured by a deed of trust and a [94] chattel mortgage and such other papers, documents and commitments as may be required by the bank or lending institution making the loan, in order to consummate said transaction, this court reserving the right, by separate order, if requested so to do, to approve the form of documents to be hereinafter executed in connection with the procuring of said loan.

Article IX

That the debtor corporation and George T. Goggin as receiver and disbursing agent, be authorized to enter into an escrow with the Title Insurance & Trust Company, as escrow holder, to consummate

the delivery of the documents required and the payment of the consideration of Five Hundred Thousand Dollars (\$500,000.00) to be paid for the benefit of the creditors of this estate, the escrow fee and title expenses to be borne by the debtor herein, said sums to be in addition to the Five Hundred Thousand Dollars (\$500,000.00) being paid to George T. Goggin, as receiver.

Article X

That as part of the order confirming this second amended plan of arrangement, the above-entitled court, on receiving the written consent and other documents that may be required of the Brown-Bevis Company, enter as part of its order herein, an order disaffirming the sale heretofore made to the Brown-Bevis Company.

Article XI

Wherein George T. Goggin is mentioned as receiver or disbursing agent, in the event of his death, resignation or incapacity, all rights in him shall vest in his successor in interest appointed by the Referee in Bankruptcy in the matter of Salsbury Motors, Inc.

Article XII

The debtor shall be vested with all parts heretofore reserved from the order confirming sale for the repair or replacement of scooters required under a warranty issued in connection with their [95] sale, upon the debtor assuming, in writing, and

agreeing to protect, George T. Goggin as receiver, and the above-entitled estate, in respect to any warranties issued by George T. Goggin in connection with said scooters.

Article XIII

That in addition to the Five Hundred Thousand Dollars (\$500,000.00) the debtor agrees to pay through said escrow, expenses incurred by this court in the giving of notice to creditors and conducting of hearings in respect to the second amended plan of arrangement, and the amended plan of arrangement heretofore filed, and for services of creditors' committee and the attorneys for the receiver, as may be fixed and allowed by the court, not exceeding the sum of Fifteen Hundred Dollars (\$1500.00).

This second amended plan of arrangement is submitted by Salsbury Motors, Inc., a California corporation, by its officers, acting under and pursuant to a resolution of its board of directors and the consent of two-thirds of its stockholders.

Dated this 7th day of July, 1948.

SALSBURY MOTORS, INC.,

By /s/ CHAS. M. WEINBERG,

President,

By /s/ MILTON SCHWARTZ,

Secretary.

Filed July 8, 1948.

HUGH L. DICKSON,

Referee. [96]

[Title of District Court and Cause.]

ORDER CONFIRMING DEBTOR'S SECOND
AMENDED PLAN OF ARRANGEMENT
UNDER CHAPTER XI OF BANKRUPTCY
ACT.

The above-named debtor, having filed its Second Amended Plan of Arrangement pursuant to permission of this Court, and notice having been given as provided by law to all creditors and other parties in interest, of a hearing to be had on July 28, 1948, at the hour of 10:00 o'clock a.m. before the undersigned Referee in Bankruptcy, and the matter having come on regularly for hearing upon said date, and the debtor having appeared by its counsel, Francis B. Cobb, and the receiver and creditors' committee having appeared in person and by their attorney, Martin Gendel, and the Bank of America National Trust and Savings Association having appeared by its attorney, Hugo A. Steinmeyer, and the Court having heard and considered the matter and the objections by the Bank of America and directed preparation of a final order approving the same, and there being no other objections by any other party or person other than said Bank of America, and the debtor having filed its application for confirmation as provided by Section 362 of the Bankruptcy Act as Amended, and having filed with the Court the consent of creditors who have filed claims, and it appearing from said consents that said Second Amended Plan of Arrange-

ment [97] has been accepted by creditors having provable claims herein in excess of a majority in number and amount of such creditors' claims, and it appearing that said arrangement has been duly accepted in accordance with the provisions of Chapter XI of the Bankruptcy Act as Amended, and that the deposits required by law have been made and provided and that said arrangement is for the best interest of the creditors of said debtor, and that said arrangement is fair and equitable and feasible and that said debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt, that the proposal of said Second Amended Plan of Arrangement and its acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by law;

It is Hereby Ordered, Adjudged and Decreed that said Arrangement, a copy of which is annexed hereto and marked Exhibit "A," be and it hereby is confirmed, except that no provision of said arrangement nor of this order confirming the same, shall have the effect of releasing Northrop Aircraft, Inc., from claims other than claims against it which George T. Goggin, as receiver or as trustee in bankruptcy of the debtor corporation, or the creditors of the debtor corporation or any of them may have against Northrop to the effect that Northrop is liable or responsible for any of the obligations of the debtor, Salsbury Motors, Inc.

It Is Further Ordered that George T. Goggin, as receiver, be and hereby is authorized to execute a release and compromise agreement, releasing the debtor corporation and Northrop Aircraft, Inc., upon receipt of the consideration and as provided in the debtor's Second Amended Plan of Arrangement.

It is Further Ordered that a sale heretofore confirmed to Brown-Bevis Company, of certain assets of this corporation, be and the same is hereby disaffirmed, that said assets covered by said [98] Order Confirming Sale are hereby vested in and adjudged to be the property of the debtor corporation, free and clear of all liens, claims and rights of all creditors and persons, and free and clear of all claims of dischargeable and non-dischargeable debts except the lien in favor of the Bank of America National Trust and Savings Association to secure a note in the amount of \$550,000.00, which note shall be secured by a deed of trust and chattel mortgage in a form to be hereinafter approved by the above-entitled court, and that said last mentioned note and the lien securing the same are to provide the consideration being received by George T. Goggin, as receiver and disbursing agent, to carry out the terms and conditions of the debtor's Second Amended Plan of Arrangement.

It is Further Ordered that the debtor shall be vested with title to all parts heretofore reserved from the Order Confirming Sale for the repair or replacement of scooters as may be required under a warranty issued in connection with their sale;

the debtor is to protect George T. Goggin, as receiver, and the above-entitled estate, in respect to any warranty issued by George T. Goggin, as receiver, in connection with said scooters.

It Is Further Ordered that this court retains and reserves jurisdiction to determine the amount and validity of all claims of creditors, both secured and unsecured, and the classification of said claims, and all objections that have heretofore been made or that may be made in regard thereto, with a like effect and power as if the above-named debtor had been adjudged a bankrupt and George T. Goggin were the acting trustee in bankruptcy; and that George T. Goggin, as receiver and disbursing agent, shall have the right to object to any and all claims with like effect as if he were acting in the capacity of a trustee in bankruptcy.

It Is Further Ordered that this court will, by separate order, provide for allowances and payment of dividends and the approval of a Report and Account of George T. Goggin, as receiver. [99]

It Is Further Ordered that George T. Goggin, as receiver, pay to creditors holding secured liens or claims against the assets of the debtor, such liens and claims, in order that the assets ordered to be delivered to the debtor may be delivered to the debtor free and clear of such liens and claims, and there is substituted in lieu of said liens and claims of creditors, the sum of \$500,000.00, being received by George T. Goggin, as receiver, as part of the

debtor's Second Amended Plan of Arrangement, and that all persons and parties shall have the right to file a claim with the above-entitled court and be paid from the assets in the hands of said George T. Goggin, as receiver, such amounts as the court may adjudge and determine, and all secured and unsecured creditors and other parties are hereby enjoined from interfering with or asserting any claim to any of the assets being vested in the debtor corporation under the Second Amended Plan of Arrangement and this order confirming the same.

Dated this 30th day of July, 1948.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

Approved as to form:

/s/ HUGO A. STEINMEYER,
Attorney for
Bank of America.

O'MELVENY & MYERS,
By /s/ MAYNARD J. TOLL,
GRAHAM L. STERLING, JR.,
Attorneys for
Northrop Aircraft, Inc.

/s/ MARTIN GENDEL,
Attorney for Receiver
Creditors' Committee. [100]

EXHIBIT "A"

Proposed Second Amended Plan of Arrangement
In Bankruptcy No. 45,207-B

In the District Court of the United States for the Southern District of California, Central Division.

In the matter of Salsbury Motors, Inc., Debtor.

Salsbury Motors, Inc., proposes the following as its second amended plan of arrangement:

Article I

That creditors of petitioner be divided into classes and that the proposed classes be as follows:

Class A: Expenses of administration incurred since the filing of the original plan of arrangement, and such expenses as may be incurred in carrying out the second amended plan of arrangement, excluding any allowance to the attorney for the debtor, but including an allowance to the attorneys for the receiver, a reasonable fee to be allowed to the creditors' committee, fee to be allowed to George T. Goggin, as receiver and as disbursing agent under the second amended plan of arrangement, which disbursing agent's fee shall be the same as that paid to a trustee in bankruptcy, and a reasonable fee to the attorneys for George T. Goggin for services rendered to him as receiver or disbursing agent, after the order of confirmation, all as may be allowed by the above-entitled court.

Class B: That there next be paid the claims in

full of all creditors entitled to priority provided in the Acts of Congress relating to bankruptcy, as amended.

Class C: That there next be paid to all creditors holding securities, liens or claims against the assets of debtor, being returned to the debtor, such amounts as the court may adjudge to be due said secured creditors.

Class D: That there shall next be paid to all other creditors of the above-named debtor, a pro rata dividend in the same manner and with like effect as if an order of adjudication were entered herein, and the trustee in bankruptcy was paying a partial or final dividend, said payments to be made at such time and in such amounts as the court may from time to time upon the petition of any party in interest, order, and the court to reserve jurisdiction to determine the amount and validity of all claims and the classification of said claims and all objections that may be made in respect thereto with like effect and power as if the above-named debtor had been adjudicated a bankrupt, and George T. Goggin was the acting trustee in bankruptcy. That said George T. Goggin, as receiver and disbursing agent, shall have the right to object to any and all claims with like effect as if he were acting in the capacity of trustee in bankruptcy.

Article II.

That there be transferred and returned to the debtor, all of the real property and personal prop-

erty referred to and sought to be sold to the Brown-Bevis Company under an order confirming sale to them on February 16, 1948, free and clear of all liens, claims and rights of all secured or unsecured persons, and free and clear of all claims of dischargeable and non-dischargeable debts except the lien in favor of a bank or lending institution in the amount of Five Hundred Fifty Thousand Dollars (\$550,000.00) hereinafter provided to be given as part of the execution of this second amended plan of arrangement, the court to enter an injunctive order in the order approving the second amended plan of arrangement, protecting the debtor and the assets so returned to the debtor from suits, claims and liens in respect to said assets and substituting in lieu thereof, for the parties asserting such claims, the right to file a claim with the above-entitled court and to be paid from the assets in the hands of George T. Goggin as receiver and disbursing agent, such amounts as the court may adjudge and determine.

Article III.

That the debtor pay within five (5) days after the order confirming this second amended plan of arrangement has become final, any unpaid portion of the sum of Five Hundred Thousand Dollars (\$500,000.00) to George T. Goggin, as receiver or disbursing agent, in consideration of the approval of the second amended plan of arrangement and the delivery of the assets to the debtor free and clear of the claims of all persons.

Article IV.

That there remain vested in George T. Goggin as receiver and disbursing agent, all causes of action, exclusive of the matters settled and compromised as set forth in Article V herein, that could or would vest in George T. Goggin as trustee in bankruptcy in the event an order of adjudication were entered in the above-entitled proceeding, with full right and power to prosecute any and all causes of action, objections to claims, with full right to assert all offsets, counterclaims and affirmative claims, and any and all other rights that are now vested in him as receiver herein or that would vest in him as a trustee in bankruptcy in the event of the entry of an order adjudging the above-named debtor to be a bankrupt under the Acts of Congress relating to bankruptcy, and the appointment of George T. Goggin as trustee in bankruptcy. There shall remain vested in the creditors, such rights of actions and claims as they may have at this time against parties other than the debtor, exclusive of the matters settled and compromised in Article V herein, without limiting any of the foregoing provisions contained in this Article, the order confirming the second amended plan of arrangement and the acceptance by creditors of the same, shall be without prejudice as to the rights of creditors, receiver, his successor in interest, or the bankrupt estate, in connection with any and all proceedings or claims existing or now pending or that may be

instituted against any person or corporation, except the rights, claims and demands settled and compromised under Article V herein.

Article V

Northrop Aircraft, Inc., hereinafter called "Northrop," has on file its claim against the debtor for \$1,345,531.72, which claim recites that the indebtedness of the debtor to Northrop as set forth therein has been subordinated to the indebtedness of said debtor to Bank of America National Trust & Savings Association by an agreement in writing between said bank and Northrop. The receiver herein has filed objections to the allowance of said claim and has asked for an order determining said claim should be subordinated to the claims of other creditors on file herein, and that Northrop is liable for all of the debts and obligations of the debtor. Northrop is willing to pay to George T. Goggin, as receiver, the consideration hereinafter described in full satisfaction of all claims and demands that any creditor may have against Northrop by reason of any and all liability incurred by the debtor. Bank of America National Trust & Savings Association, by reason of said subordination agreement executed by Northrop, asserts the right to receive dividends upon said claim of Northrop *pari passu* with other general claims against the debtor, until it has received satisfaction of the total amount of its present claim of \$198,818.44 (representing the unpaid balance remaining after allowance of the

banker's lien and setoff pursuant to order of Referee Dickson dated March 22, 1948), which position is resisted by the receiver and creditors, and a controversy exists in regard thereto. The receiver and creditors desire that dividends be paid to creditors forthwith, without the Northrop claim participating therein, and without the receiver withholding funds in respect to said claim of Northrop against the debtor pending final determination of the above controversy in respect to dividends on said claim of Northrop against the debtor.

That therefore as part of this second amended plan of arrangement, and to be included in the order approving the same, the following settlement, releases and consideration to be paid will be effected:

1. George T. Goggin, as receiver, acting for and on behalf of all creditors herein and on behalf of the above estate, execute a release and compromise agreement releasing the debtor corporation and Northrop Aircraft, Inc., of all claims, demands of every character and nature, arising out of transactions between the creditors and the debtor herein.

2. In consideration of said release and in consideration of the creditors consenting to the second amended plan of arrangement, and in consideration of the court approving the same, Northrop Aircraft, Inc., will:

- (a) Forthwith pay to George T. Goggin, as receiver, and as the representative of creditors, the

sum of Seventy-five Thousand Dollars (\$75,000.00) to be disbursed and paid to creditors as may be ordered paid by the court and as herein provided. Without affecting the generality of the release stated herein, it is agreed that the legal basis for the payment thereof is the settlement of the controversy of the "alter ego" contentions of the receiver.

(b) Agree to the entry of an order subordinating all of its right, title and interest in and to its said claim against the debtor to the claims of all other creditors herein;

(c) In order to consummate the payment to creditors pending a determination of the above-mentioned controversy between George T. Goggin, as receiver herein, and the Bank of America National Trust & Savings Association, Northrop agrees to execute an indemnity agreement or surety bond, or to make a cash deposit, as it may elect, in such form and amounts as may be hereinafter approved by the above-entitled court after notice to the Bank of America, said indemnity agreement surety bond or deposit to indemnify George T. Goggin as receiver herein, and to be in the approximate sum of \$90,000.00, which is the amount estimated as the maximum amount payable as a dividend to the Bank of America upon Northrop's claim in the event that the Bank of America is adjudged by final order of the court to be correct in its contentions as above set forth. The indemnity liability of Northrop shall not be increased by reason of any

increase in the claim of the Bank of America as above set forth, or by reason of any subordination of such claim of the Bank of America, in whole or in part, to the claims of other general creditors with respect to the funds in the hands of George T. Goggin, as receiver, or any part thereof, or as a result of any other litigation, controversy or settlement between said George T. Goggin and said Bank of America, which affect the status or the amount of said claim.

(d) Northrop will deposit, or include in said indemnity agreement, an amount equal to a sum required to be paid into the Referee's Salary Fund in the event a dividend is required to be paid on the Northrop claim.

(e) Northrop will deposit or include in said indemnity agreement, a provision agreeing to reimburse this estate or George T. Goggin, as receiver, for the actual cost incurred and for his attorney's fees incurred in the prosecution or defense of the litigation with the Bank of America National Trust & Savings Association, involving the Northrop claim and the right to receive dividends thereon, said sums to be hereinafter fixed by the above-entitled court after a final order.

Article VI

The court to retain jurisdiction to carry out the plan of arrangement and to pass upon all controversies with creditors and third parties, with like effect as if an order of adjudication were entered

herein and George T. Goggin was appointed trustee in bankruptcy.

Article VII

In the event any claims are in controversy, that the court reserve jurisdiction to direct George T. Goggin as receiver and disbursing agent, to hold and retain sufficient sums as the court may direct and order, to cover prospective dividends in respect to said disputed claims, and that pending a final determination of said controversy, dividends be paid to other creditors whose claims are not in dispute, in such amounts and at such times as the court may hereinafter order.

Article VIII

That in order to enable your petitioner to carry out this second amended plan of arrangement, it is necessary that your petitioner borrow from a bank or lending institution, the sum of Five Hundred Fifty Thousand Dollars (\$550,000.00) and to secure said loan by the giving of a trust deed and chattel mortgage creating a first lien against all of the assets being returned to the debtor under this second amended plan of arrangement. That the president and secretary of the debtor be authorized to execute a note, secured by a deed of trust and a chattel mortgage and such other papers, documents and commitments as may be required by the bank or lending institution making the loan, in order to consummate said transaction, this court reserving

the right, by separate order, if requested so to do, to approve the form of documents to be hereinafter executed in connection with the procuring of said loan.

Article IX

That the debtor corporation and George T. Goggin as receiver and disbursing agent, be authorized to enter into an escrow with the Title Insurance & Trust Company, as escrow holder, to consummate the delivery of the documents required and the payment of the consideration of Five Hundred Thousand Dollars (\$500,000.00) to be paid for the benefit of the creditors of this estate, the escrow fee and title expenses to be borne by the debtor herein, said sums to be in addition to the Five Hundred Thousand Dollars (\$500,000.00) being paid to George T. Goggin, as receiver.

Article X

That as part of the order confirming this second amended plan of arrangement, the above-entitled court, on receiving the written consent and other documents that may be required of the Brown-Bevis Company, enter as part of its order herein, an order disaffirming the sale heretofore made to the Brown-Bevis Company.

Article XI

Wherein George T. Goggin is mentioned as receiver or disbursing agent, in the event of his

death, resignation or incapacity, all rights in him shall vest in his successor in interest appointed by the Referee in Bankruptcy in the matter of Salsbury Motors, Inc.

Article XII

The debtor shall be vested with all parts heretofore reserved from the order confirming sale for the repair or replacement of scooters required under a warranty issued in connection with their sale, upon the debtor assuming, in writing, and agreeing to protect, George T. Goggin as receiver, and the above-entitled estate, in respect to any warranties issued by George T. Goggin in connection with said scooters.

Article XIII

That in addition to the Five Hundred Thousand Dollars (\$500,000.00) the debtor agrees to pay through said escrow, expenses incurred by this court in the giving of notice to creditors and conducting of hearings in respect to the second amended plan of arrangement, and the amended plan of arrangement heretofore filed, and for services of creditors' committee and the attorneys for the receiver, as may be fixed and allowed by the court, not exceeding the sum of Fifteen Hundred Dollars (\$1500.00).

This second amended plan of arrangement is submitted by Salsbury Motors, Inc., a California corporation, by its officers, acting under and pursuant

to a resolution of its board of directors and the consent of two-thirds of its stockholders.

Dated this 7th day of July, 1948.

SALSBURY MOTORS, INC.,

By /s/ CHAS. M. WEINGERG,
President,

By /s/ MILTON SCHWARTZ,
Secretary.

Filed June 20, 1948.

HUGH L. DICKSON,
Referee. [101]

[Title of District Court and Cause.]

CONSENT BY CREDITOR TO SECOND AMENDED PLAN OF ARRANGEMENT

The undersigned, being a creditor of the above-named debtor, holding a claim in the amount of \$4393.06, acknowledges that the undersigned has received a copy of the debtor's second amended plan of arrangement and does hereby consent to said second amended plan of arrangement and the provisions and terms thereof, and agrees that the above-entitled court may enter an order confirming the same.

Upon the court approving the debtor's second amended plan of arrangement, and in consideration of the dividends to be forthwith received by the undersigned creditor as provided therein, the un-

dersigned hereby releases the debtor corporation and Northrop Aircraft, Inc., of all claims, demands and causes of action of every character and nature arising out of transaction between the undersigned and the debtor. [102]

This consent to the second amended plan of arrangement, except in respect to the release of the debtor and Northrop Aircraft, Inc., and the approval and confirmation by the court, shall not in any manner prejudice the rights, defenses or cause of action that the undersigned, as a creditor, would have, or that George T. Goggin, as receiver, now has, or that George T. Goggin, as trustee in bankruptcy, would have, or any creditor of Salsbury Motors, Inc., would have, in the event that Salsbury Motors, Inc., were adjudged a bankrupt and George T. Goggin were duly appointed trustee in bankruptcy, but that the rights of the undersigned and all parties shall be the same as if Salsbury Motors, Inc., were so adjudged a bankrupt and George T. Goggin were appointed trustee.

Dated: July 15, 1948.

DUCOMMUN METALS &
SUPPLY CO.,

Creditor.

C. A. WARNACUTT,
Credit Manager.

Filed July 29, 1948.

HUGH L. DICKSON,
Referee.

[Title of District Court and Cause.]

PETITION OF RECEIVER FOR ORDER SUB-
ORDINATING CLAIMS OF BANK OF
AMERICA

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy:

Comes now your petitioner George T. Goggin, and
respectfully represents as follows:

I.

That he is the duly appointed, qualified and
acting Receiver in the within Chapter XI proceed-
ings.

II.

That heretofore the Bank of America National
Trust & Savings Association (hereinafter referred
to as Bank of America) filed a claim in the within-
bankruptcy proceedings for an amount in the sum
of \$601,482.80, plus interest; that the amount now
owing to Bank of America is the sum of \$198,-
818.44; this sum represents the unpaid balance re-
maining after allowance of the banker's lien and
setoff pursuant to order of Referee Dickson dated
March 22, 1948, which order is now on appeal by
your petitioner. [104]

III.

Your petitioner is informed and believes, and
therefore alleges that commencing in the early part
of the year 1946, Bank of America received from
Salsbury Motors Inc., the debtor herein, regular

monthly balance sheet statements and profit and loss statements, which profit and loss statements and balance sheets clearly reflected, in each month, that Salsbury Motors Inc., was not only losing money, but was actually insolvent as the word insolvent is defined by the Bankruptcy Act as amended. That the items now covered by the proof of claims filed in the within proceedings by Bank of America were then, at all times, due and owing, and after receipt of the first balance sheet and profit and loss statement evidencing in writing that Salsbury Motors Inc., was insolvent, the indebtedness reflected by the proof of claim of the Bank of America were in default; that in the face of such continuous default, Bank of America nevertheless did not enforce the terms of the written obligations evidencing the loans made by Bank of America to Salsbury Motors Inc., and permitted and allowed the said Salsbury Motors Inc., to continue to operate and to continue to incur new and additional liabilities, all as reflected by the provable claims of creditors now filed and allowed in the within bankruptcy proceedings.

IV.

That since Bank of America, knowingly and deliberately, permitted Salsbury Motors Inc., to operate while Bank of America was fully informed of the insolvency of said debtor, and because the conduct of Bank of America caused the continued extension of credit by the creditors' claims as hereabove described, it now appears, as a matter of law, that having withheld enforcement of the obligations

owing to it from the debtor herein, Bank of America is now estopped to contend that it is entitled to receive dividends upon whatever amount is ultimately allowed to it, as a provable [105] claim; that as a matter of law, the conduct of the Bank of America now estops said Bank from attempting to participate on a parity with the remaining unsecured trade creditors; that having lulled the aforesaid creditors into a feeling of security, thereby inducing the continued extension of credit by said creditors, caused by the failure of the Bank to declare default in the largest single claim against Salsbury (with the exception of the subordinated Northrop Aircraft, Inc., claims), Bank of America, as a matter of equity, is not entitled to receive any dividend on its claims until all other provable creditors have been paid in full.

V.

Without prejudice to the position of the Receiver as hereinabove alleged, but in order to present all of the facts and legal contentions now available to the Receiver with reference to the subject matter of subordination of the claims of the Bank of America, your petitioner further alleges as follows:

That as is reflected in Article V of the approved Second Amended Plan of Arrangement, your petitioner, as Receiver, filed objections to the claim of Northrop Aircraft, Inc. (hereinafter referred to as Northrop), and likewise sought affirmative relief against Northrop on the grounds that it was the "alter ego" of the debtor herein and was responsible for any deficiency in the total amount of the

claim after the dividends were paid to creditors; Northrop thereafter made an offer of compromise and settlement which was incorporated in the Second Amended Plan of Arrangement and has therein agreed to pay the sum of \$75,000.00 to your petitioner which payment is predicated upon the aforesaid "alter ego" contention of your petition; your petitioner believes, and therefore alleges, that the one creditor who had actual knowledge that it was apparently not the intention of Northrop to be responsible for the obligations of Salsbury, was and is Bank of America; the dealings between the Bank of America and Northrop with [106] reference to Salsbury Motors, Inc., loans were dealings reflected in writing and the Bank of America obtained from Northrop an agreement to subordinate the payment of any of its loans to the debtor herein until Bank of America was paid in full; but no express assumption or guarantee of liability was obtained by Bank of America from Northrop; therefore, since Bank of America knew that Northrop was not guaranteeing the payment of Salsbury claims it would be inequitable to allow Bank of America to participate in any dividend payable to creditors from the said \$75,000.00.

Wherefore, your petitioner prays that this Court make an order directing Bank of America to appear and show cause why: (1) any payment on the claim of Bank of America, against the within estate, as finally allowed, should not be subordinated to the payment of all other creditors; (2) if paragraph (1) is denied, why Bank of America should not

be subordinated with reference to the \$75,000.00 hereinabove described to the extent that it does not participate in any dividends from the said \$75,000.00 until all other creditors are paid in full.

Dated this 30th day of July, 1948.

/s/ GEORGE T. GOGGIN,
Receiver.

Of Counsel,

/s/ MARTIN GENDEL. [107]

State of California,
County of Los Angeles—ss:

George T. Goggin being by me first duly sworn, deposes and says: that he is the Petitioner in the above-entitled action; that he has read the foregoing Petition of Receiver for Order Subordinating Claims of Bank of America and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ GEORGE T. GOGGIN.

Subscribed and sworn to before me this 30th day of July, 1948.

[Seal] /s/ ESTHER ANDERSON,
Notary Public in and for said County and State of California.

Filed July 30, 1948.

HUGH L. DICKSON,
Referee.

[Title of District Court and Cause.]

SUPPLEMENT TO PETITION OF RECEIVER
FOR ORDER SUBORDINATING CLAIMS
OF BANK OF AMERICA

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy:

Comes now your petitioner, George T. Goggin, and
respectfully represents as follows:

VI.

That he is the duly appointed, qualified and acting Receiver in the within Chapter XI proceedings; that he heretofore filed with this Court by document dated the 30th day of July, 1948, a "Petition of Receiver for Order Subordinating Claims of Bank of America"; that in clarification of the scope of the basis for the Petition to Subordinate the claims of Bank of America, your petitioner supplements the said original petition by the addition thereto of the following allegations:

VII.

That the Bank of America, for the period between January 1, 1947, and August 20, 1947, knew the following facts: That Salsbury Motors, Inc., was at all times insolvent; that Salsbury Motors, Inc., was unable to meet and pay its current obligations in substantial amounts owing to Bank of America; that Salsbury Motors, Inc., [109] was definitely undercapitalized and unable to operate successfully with

its then capitalization; that Northrop Aircraft, Inc., would not pay or guarantee the obligations of Salsbury Motors, Inc.; that Northrop Aircraft, Inc., had determine that it would not advance any additional monies to Salsbury Motors, Inc.; that Salsbury Motors, Inc., was not paying, to unsecured creditors, the current obligations as they became due. That notwithstanding this knowledge on the part of Bank of America, in response to many individual credit inquiries by creditors and prospective creditors who are now unpaid and unsecured trade creditors in the within reorganization proceedings, and in response to inquiries from credit agencies for the purpose of having said agencies furnish the said information to creditors or prospective creditors of the debtor herein, prior to bankruptcy, Bank of America informed such persons that the financial condition of Salsbury Motors, Inc., was satisfactory, that it appeared to have an excellent record for trade payments; that it was a wholly owned subsidiary of Northrop Aircraft, Inc., and intimated that Northrop Aircraft would supply all the necessary financing and capital; that no revelation was made that the obligations owing to the Bank of America were in default and had to be renewed or extended without payment thereof; that no revelation was made that the trust deed encumbrance held by the Bank of America on the real property of the Debtor was likewise security for other apparently unsecured obligations of the Debtor held by the Bank of America.

VIII.

That the current unpaid trade creditors in the within reorganization proceedings extended credit to the debtor substantially in reliance upon the position taken by the Bank of America and the misinformation circulated by it in connection with the financial condition of the Debtor and the purported financial support thereof by Northrop Aircraft, Inc.; that the Bank of America well knew that the said creditors would so rely upon the facts as [110] alleged hereinabove in extending credit to the Debtor herein.

Wherefore, your petitioner prays that this Court make an order directing Bank of America to appear and show cause why: (1) any payment on the claim of Bank of America, against the within estate, as finally allowed, should not be subordinated to the payment of all other creditors; (2) if paragraph (1) is denied, why Bank of America should not be subordinated with reference to the \$75,000.00 herein above described to the extent that it does not participate in any dividends from the said \$75,000.00 until all other creditors are paid in full.

Dated this 20th day of January, 1949.

/s/ GEORGE T. GOGGIN,
Receiver.

Of Counsel:

/s/ MARTIN GENDEL.

State of California,
County of Los Angeles—ss.

George T. Goggin being by me first duly sworn,
deposes and says:

That he is the petitioner in the above-entitled matter; that he has read the foregoing supplement to Petition of Receiver for Order Subordinating Claims of Bank of America and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ GEORGE T. GOGGIN.

Subscribed and sworn to before me this 20th day
of January, 1949.

[Seal] /s/ ESTHER ANDERSON,
Notary Public in and for the County of Los An-
geles, State of California.

Receipt of Copy Acknowledged.

Filed January 21, 1949.

HUGH L. DICKSON,
Referee.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE RE:
BANK OF AMERICA

Upon Reading and filing the verified petition of George T. Goggin, as Receiver, with reference to the subordinating claims of Bank of America, and upon motion of Martin Gendel, one of his counsel, and good cause appearing therefor, Bank of America National Trust & Savings Association is hereby directed to appear before the Hon. Hugh L. Dickson, Referee in Bankruptcy, in his courtroom located on the 3rd floor of the Federal Building, Temple and Spring Streets, Los Angeles, California, on the 16th day of September, 1948, at the hour of 2 p.m., or as soon thereafter as counsel can be heard, then and there to show cause why the petition aforesaid, a copy of which accompanies the within order to show cause, should not be granted.

This order to show cause may be served by duly serving copies upon the law office of Hugo A. Steinmeyer, as attorneys for Bank of America, said service to be made at least 5 days before the date of the above hearing.

Dated this 30 day of July, 1948.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

Filed July 30, 1949.

HUGH L. DICKSON,
Referee. [113]

[Title of District Court and Cause.]

AGREEMENT OF INDEMNITY OF NORTH-
ROP AIRCRAFT, INC., AND ORDER OF
COURT APPROVING SAME

Whereas, pursuant to the provisions of the "Debtors' Proposed Second Amended Plan of Arrangement" dated July 7, 1948, and approved by order of the Honorable Hugh L. Dickson under date of July 30, 1948 (herein called the "Plan"), Northrop Aircraft, Inc., (herein called "Northrop") agreed to execute certain indemnity agreements, and

Whereas, pursuant to said Plan and the undertakings therein, George T. Goggin, Receiver, has paid out dividends to creditors of Salsbury Motors, Inc., without reserving funds to [114] pay a dividend on the claim of Northrop, and

Whereas, said estate may by final order of the Court be held not to be relieved from legal liability to pay a dividend on said claim of Northrop,

Now, Therefore, in consideration of the above and for the considerations set forth in Article V 2 of said Plan, Northrop hereby undertakes and promises as follows:

1. To indemnify George T. Goggin, as receiver of this estate:

a. Against and to hold him harmless from any and all loss, liability, claims, damages and expenses incurred by him or which he may have become liable for by reason of an order becoming final beyond appeal in the above-entitled proceeding determining

that the claim of Northrop was and is entitled to participate and share in the dividends upon an equal basis with other creditors, and that the Bank of America National Trust & Savings Association (herein called the "Bank") is entitled to receive dividends on the Northrop claim to the extent necessary to satisfy the claim of the Bank against the debtor; it being understood that the liability of Northrop under this paragraph 1-a is in the approximate sum of \$90,000.00 and shall not be increased by reason of any increase in the claim of the Bank over and above its present claim of \$198,818.44 or by reason of any subordination of such claim of the Bank in whole or in part to the claims of other general creditors with respect to the funds in the hands of George T. Goggin as receiver or any part thereof or as a result of any other litigation, controversy or settlement between said George T. Goggin as receiver and the Bank which affects the status or the amount of the said claim;

b. Against and to hold him harmless from all loss, [115] liability, claims, demands and expenses which the said George T. Goggin, as receiver of this estate, may sustain or become liable for by reason of:

(1) The statutory liability if any to make payment into the Referee's Salary Fund because of the payment, if any, made under paragraphs 1-a or 2-b hereof;

(2) Actual costs and attorneys' fees incurred by George T. Goggin, as receiver, in the prosecution or defense of the litigation involv-

ing the Northrop claim and the right of the Bank to receive dividends thereon, in such sums as may be fixed by the above-entitled Court.

2. Forthwith upon an order becoming final beyond appeal adjudging that the claim of Northrop is entitled to participate in dividends upon an equal basis with other creditors and that the Bank is entitled to receive the dividends on said claim to the extent necessary to satisfy its claim, to discharge and satisfy the within indemnity agreement by either:

a. Obtaining a written release and satisfaction from the Bank in favor of the Receiver of this estate of all claims of the Bank against the receiver with respect to the liability herein indemnified against; or,

b. Paying to the receiver of the estate the amount required to be paid by the receiver to the Bank pursuant to the provisions of paragraph 1-a hereof.

3. To pay to the receiver of this estate the amount or amounts required to be paid by the provisions of subdivisions (d) and (e) of paragraph No. 2 of Article V of the Second Amended [116] Plan of Arrangement; said payment to be made by Northrop upon the order involving the contentions of the Bank herein becoming final beyond appeal.

4. Northrop agrees that the above-entitled Court shall retain jurisdiction of the subject matter and parties to this agreement pending the final satisfaction or discharge of this agreement and that exe-

cution or other process of this Court may issue for such purpose.

In Witness Whereof said Northrop Aircraft, Inc., has executed this indemnity agreement this 19th day of November, 1948, by its officers thereunto duly authorized.

NORTHROP AIRCRAFT, INC.,

By /s/ C. N. MONSON.

[Seal] By /s/ GEORGE GORE.

The foregoing indemnity agreement is hereby approved as to form.

/s/ MARTIN GENDEL,

Of Counsel for George T.
Goggin as Receiver.

HUGO A. STEINMEYER,

JOHN E. WALTER,

G. L. BERREY,

ROBERT H. FABIAN,

By /s/ ROBERT H. FABIAN,

Counsel for Bank of America National Trust &
Savings Association.

It Is Hereby Ordered:

1. That the foregoing indemnity agreement is approved and ordered filed with the Clerk of this Court; [117]

2. That this Court retains jurisdiction of the subject matter and parties to the said agreement pending its final performance or discharge and that

execution and other process of this Court may issue for such purpose.

Dated this 23 day of Nov., 1948.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

I, George Gore, Secretary of Northrop Aircraft, Inc., hereby certify that a meeting of the Board of Directors of said Corporation was duly held at its offices in the City of Hawthorne, State of California, on June 23, 1948; that at said meeting a majority and quorum of said Directors were present and voting throughout; and that the following paragraphs are a true and correct copy of a portion of the minutes of said meeting and that the resolutions set forth therein are now in full force and effect:

“Mr. Gore reported on the transactions since February, 1948, affecting Salsbury Motors. He explained that the Receiver had filed a petition in the Bankruptcy Court seeking disallowance of the Northrop claim against the estate and also asking that an order be entered requiring Northrop to pay the entire deficiency remaining after all assets of the estate had been distributed to creditors. This deficiency was presently estimated at \$380,000. He said that certain officers of the corporation had proposed to the Receiver (a) that Northrop pay the estate \$75,000 in full settlement of all claims of all creditors against Northrop and (b) that Northrop subordinate all of its right, title and interest in and

to the Northrop claim against the estate to the claims of all other creditors. This proposal is acceptable to the creditors other than the Bank of America. The Bank is taking the position that the Northrop claim against the estate is valid and that the bank is entitled to the dividend payable upon it. In order to meet the bank's objections to the proposal, officers of the corporation had offered to execute, on behalf of the corporation, an indemnity agreement protecting the Receivership estate in the event final judgment of the Court were in favor of the bank's contentions. The exact amount of the indemnity cannot be fixed because the Receiver does not now know what reductions he may be able to effect in the claims as filed and scheduled. On the basis of estimates made by the Receiver and his attorney, it is believed that this indemnity will be in the amount of approximately \$87,140. It could run as high as approximately \$101,000 if no reductions at all are made in the claims as now filed and scheduled. Negotiations with the Receiver and the bank are continuing. The Board approved of the action of the officers in making the offer to pay the Receivership \$75,000 and to subordinate the corporation's interest in the Northrop claim to the claims of all other creditors. General authority was conferred to conduct negotiations along the lines above set forth, including the execution of the indemnity agreement if necessary. Mr. Millar thought these decisions should be incorporated in formal resolutions, and accordingly, upon motion of Mr. Pederson, seconded

by Mr. McDuffie, [119] the following resolutions were unanimously adopted:

“Whereas this corporation has filed its claim for approximately \$1,345,000 against Salsbury Motors, Inc., Debtor in a Chapter XI proceeding; and

“Whereas, the Receiver of said Debtor, on behalf of the estate and of all creditors, has filed a petition in the Bankruptcy Court requesting that said claim be disallowed and further requesting that the Court order this corporation to pay the entire deficiency, presently estimated at \$380,000; and

“Whereas a written proposal has been made on behalf of this corporation for settlement of the asserted claim by the payment to the estate of \$75,000 and the subordination of all of this corporation’s interest in the Northrop claim against the estate to the claims of all other creditors, which offer will herein be called the ‘Offer of May 28, 1948’; and

“Whereas Bank of America contends that by reason of a subordination agreement dated September, 1946, between said bank and this corporation, the bank is the equitable owner or has an equitable lien upon the claim of this corporation against the Debtor and is entitled to any dividend payable thereupon, up to the amount required to make it whole; and

“Whereas it may be desirable and beneficial to this corporation to meet this claim of the bank by the execution of an indemnity agreement, payment under which will be dependent upon the bank establishing in court its contentions with respect to

ownership or interest in the Northrop claim, which indemnity agreement will be in an amount indeterminate at this time, but which could vary from approximately \$87,140 to \$101,000, depending upon the aggregate amount of claims against the estate; and

“Whereas outside counsel for this corporation after a careful investigation of the facts and the law and after extended negotiations with the Receiver, his attorney and the Creditors Committee of the Debtor, have recommended the foregoing settlement as beneficial to the corporation under the circumstances; and

“Whereas this Board of Directors deems said settlement to be to the best interest of this [120] corporation and its shareholders in that the same is a reasonable and beneficial compromise of a bona fide controversy in which a much greater liability might be imposed upon the corporation; and

“Now Therefore Be It Resolved that the acts of the officers of this corporation in making the Offer of May 28, 1948, in settlement of the claims made against this corporation by the Receiver and the creditors of Salsbury Motors, Inc., be and they hereby are ratified and approved as the acts of this corporation; and

“Resolved that the officers of this corporation be and they hereby are authorized to continue negotiations with the Receiver and the Bank of America and to offer if necessary, in addition to the consideration set forth in the Offer of May 28, 1948, to

execute an indemnity agreement in the amount and upon the terms as above set forth; and

“Resolved that if necessary the officers are also empowered to include in any proposal for settlement an offer to pay (a such amount as may be required to be paid into the Referee’s fund in case the bank is successful in its contentions with respect to the Northrop claim and (b) costs and reasonable attorney’s fees of the Receiver in resisting the contentions of the bank.”

In Witness Whereof, I have hereunto set my hand as Secretary of said Corporation, and affixed the corporate seal this 29th day of October, 1948.

[Seal] /s/ GEORGE GORE,

Secretary, Northrop
Aircraft, Inc.

Filed Nov. 23, 1948.

HUGH L. DICKSON,
Referee.

[Title of District Court and Cause.]

RELEASE AND SATISFACTION
OF INDEMNITY AGREEMENT

Whereas, pursuant to the “Debtor’s Proposed Second Amended Plan of Arrangement” dated July 7, 1948, (herein called the Plan) approved by an order of the Honorable Hugh L. Dickson under date of July 30, 1948, Northrop Aircraft, Inc. (herein

called Northrop), agreed to execute certain indemnity agreements required by said Plan, in order to permit the Receiver herein to pay a general dividend to creditors, from the assets then in the hands of the Receiver, without reserving therefrom an amount [122] sufficient to pay a like dividend upon the claim of Northrop filed herein, and

Whereas, pursuant to the said Plan Northrop did thereafter execute and file herein an Agreement of Indemnity dated November 19, 1948, which agreement was approved by an order of the Referee dated November 23, 1948, and

Whereas, the undersigned Bank of America National Trust and Savings Association, a creditor herein, has asserted the right to receive dividends upon the claim of Northrop filed herein to the extent necessary to pay its claim in full, and

Whereas, Northrop has paid or agreed to pay to the undersigned an amount equal to the amount that it would have received if it had received, from the assets in the hands of the Receiver at the date of confirmation of the Plan, a dividend upon Northrop's claim, at the same rate of dividends paid to creditors generally, to the extent necessary to pay its claim in full.

Now, Therefore, the undersigned Bank of America National Trust and Savings Association does hereby release and discharge George T. Goggin, the Receiver herein, and the estate of the Debtor herein, of and from any and all liability to pay to the undersigned any dividend upon the claim of

Northrop from the assets of the estate in the hands of the Receiver at the date of confirmation of the said Plan.

It is expressly understood that the undersigned Bank does not release or waive any right that it may have to receive dividends upon the claim of Northrop in the same percentage as is paid upon general claims, as to any assets received by the Receiver subsequent to the date of confirmation of the Plan, including, but without being limited thereby, any assets recovered by the Receiver under his asserted right to recover [123] from the undersigned Bank certain items upon which the undersigned claimed a banker's lien and which have heretofore reduced the amount of the claim filed by the undersigned herein.

Dated December 23, 1948.

BANK OF AMERICA
NATIONAL TRUST AND
SAVINGS ASSOCIATION,

By /s/ [Indistinguishable],
Vice President.

[Seal] By /s/ [Indistinguishable],
Assistant Secretary.

Filed Jan. 6, 1949.

HUGH L. DICKSON,
Referee. [124]

[Title of District Court and Cause.]

RESPONSE TO ORDER TO SHOW CAUSE RE
PETITION OF RECEIVER FOR ORDER
SUBORDINATING CLAIMS OF BANK OF
AMERICA NATIONAL TRUST AND SAV-
INGS ASSOCIATION

Comes now Bank of America National Trust and Savings Association and in response to the order to show cause above described asserts the following:

1. This Court has no jurisdiction to entertain the Receiver's petition for the reason that objections have heretofore been filed to the claim of Bank of America National Trust and Savings Association, and the order of approval of said claim and all matters in connection therewith are pending on appeal in the Court of Appeals for the Ninth Circuit. Until determination of said appeal this Court has no jurisdiction of the subject matter of the Receiver's petition.

2. This Court has no jurisdiction to hear and determine said controversy for the reason that the order confirming the second amended plan of arrangement under Chapter XI of the Bankruptcy Act disposed of and finally determined all matters in [125] connection with the estate of the above-named debtor except only the jurisdiction and power to determine the amount and validity of claims. The general powers of the Court under the Bankruptcy Act have been exhausted by the order approving the second amended plan of ar-

rangement, and the Court has no jurisdiction to determine controversies between creditors with respect to priority of claims.

3. George T. Goggin, as Receiver herein, has no power or authority to file the petition for order to show cause above described for each of the following reasons:

(a) The order confirming the second amended plan of arrangement granted power and authority to George T. Goggin as Receiver and disbursing agent to object to any and all claims with like effect as if he were acting in the capacity of a Trustee in Bankruptcy but reserved or granted no other additional powers, and said George T. Goggin is acting entirely beyond the scope of the power and authority reserved to him by the order confirming the second amended plan of arrangement in the filing and prosecution of the above-designated order to show cause.

(b) The subject matter of the Receiver's petition for an order directing the subordination of the claim of said Bank is not lawfully the basis of any proceeding initiated by a Receiver or disbursing agent or a Trustee in Bankruptcy. The facts purportedly alleged in the Receiver's petition and supplement to petition if true might constitute the basis of a proceeding by a creditor asserting prejudice by reason of alleged misinformation, but neither the estate of the bankrupt nor the Receiver, disbursing agent or any Trustee has any interest in any such controversy. [126]

4. The facts purportedly alleged in the Receiver's petition and the supplement to the Receiver's petition if true do not constitute lawful grounds for the relief therein asked.

Wherefore, said Bank prays that the Receiver's petition be denied and the order to show cause issued thereon be dismissed.

Dated this 2d day of March, 1949.

/s/ HUGO A. STEINMEYER,

/s/ ROBERT H. FABIAN,

Attorneys for Bank of America National Trust and Savings Association.

Filed Mar. 2, 1949.

HUGH L. DICKSON,

Referee. [127]

[Title of District Court and Cause.]

NOTICE OF MOTION BY GEORGE T. GOGGIN, AS RECEIVER, TO RECONSIDER RULING ON MOTION OF BANK OF AMERICA OBJECTING TO THE JURISDICTION OF THE BANKRUPTCY COURT RE: SUBORDINATION HEARING

To: Bank of America National Trust & Savings Association, and Hugo A. Steinmeyer and Robert H. Fabian, its attorneys:

You and Each of You will please take notice that on Friday, March 18, 1949, at the hour of 10:00

o'clock a.m., or as soon thereafter as counsel can be heard in the courtroom of the above-entitled court, Room 343 Federal Building, Los Angeles, California, before the Honorable Hugh L. Dickson, Referee in Bankruptcy, George T. Goggin, as Receiver, will move the above-entitled Court to reconsider the oral ruling made by the said Referee on March 2, 1949, sustaining the motion of Bank of America National Trust & Savings Association in objecting to the jurisdiction of the said Referee to proceed with the hearing on the order to show cause issued on July 30, 1948, involving relief prayed for by the said Receiver for an order subordinating the claims of Bank of America; said ruling has not yet been signed or entered.

Said motion will be made and based upon the petition, [128] and supplement to petition, in support of the aforesaid order to show cause, issued on July 30, 1948, upon the terms and provisions of the debtor's Second Amended Plan of Arrangement under Chapter XI, upon the consents to said Second Amended Plan, upon the order of the said Referee of July 30, 1948, confirming the said debtor's Second Amended Plan, and upon all of the papers and pleadings now on file in the within proceedings; upon the further ground that to deny jurisdiction to hear the subordination order to show cause contrary to the express provisions of the Second Amended Plan, upon which provisions the consent of the creditors was obtained, and incorporated expressly in the order approving the Second Amended

Plan, would be to use the Bankruptcy Court as a means of creating a result which would work a fraud and injustice upon all of the unsecured creditors in the within bankruptcy proceeding; said motion is further made and based upon the Points and Authorities attached hereto and made a part hereof by reference as though set forth verbatim.

Dated: March 4, 1949.

GEORGE T. GOGGIN,
As Receiver,

By MARTIN GENDEL,
Of Counsel.

Affidavit of Service by Mail Attached.

Filed Mar. 8, 1949.

HUGH L. DICKSON,
Referee. [129]

[Title of District Court and Cause.]

ORDER ON PETITION OF RECEIVER FOR
ORDER SUBORDINATING CLAIMS OF
BANK OF AMERICA AND ON SUPPLE-
MENTAL PETITION THERETO

The above matter came on for hearing on March 2, 1949, upon an Order to Show Cause directed to Bank of America National Trust and Savings Association, the Petition of Receiver for Order Subordinating Claims of Bank of America, Supple-

ment to Petition of Receiver for Order Subordinating Claims of Bank of America and Response of Bank of America to Order to Show Cause Re Petition of Receiver for Order Subordinating Claims of Bank of America, the Receiver being represented by his attorneys, Gendel and Chichester appearing by Martin Gendel, and the Respondent, Bank of America National Trust and Savings Association, being represented by its attorneys, Hugo A. Steinmeyer and Robert H. Fabian, and the matter having been argued by the respective counsel and submitted to the Court for its decision, and the Court having directed an order denying the petition of the Receiver and directing that the Order to Show Cause thereon be dismissed; and

George T. Goggin, as Receiver, having filed herein a [150] Motion to Reconsider the Ruling of the Court thereon prior to the entry of such order; and

The matter having again come on for hearing on March 18, 1949, the Receiver being represented by his attorneys, Martin Gendel and Frank M. Chichester, and the Respondent, Bank of America National Trust and Savings Association, being represented by its attorneys, Hugo A. Steinmeyer and Robert H. Fabian, and the matter having again been argued by respective counsel and the Court being fully advised in the premises; and

It appearing to the Court that the objections set forth in the said response of Bank of America National Trust and Savings Association are well founded; and

It appearing that the Court has no jurisdiction over the controversies and issues raised by the said Petition and response thereto; and

It further appearing to the Court that the said Receiver is without power or authority to prosecute the proceedings initiated by the said Petition and Order to Show Cause;

It Is Ordered that the said Petition of the Receiver and Supplemental Petition of Receiver thereto be denied and the Order to Show Cause thereon dismissed.

Dated this 19 day of March, 1949.

/s/ HUGH L. DICKSON,
Referee.

Approved as to form only:

GENDEL AND CHICHESTER.

Receipt of Copy Acknowledged.

Filed Mar. 19, 1949.

HUGH L. DICKSON,
Referee. [151]

[Title of District Court and Cause.]

OBJECTIONS OF RECEIVER TO PROPOSED
“ORDER ON PETITION OF RECEIVER
FOR ORDER SUBORDINATING CLAIMS
OF BANK OF AMERICA AND ON SUP-
PLEMENT TO PETITION THERETO”

To The Honorable Hugh L. Dickson, Referee In
Bankruptcy:

Comes now George T. Goggin, as Receiver of the above-named debtor, through his counsel, pursuant to Rule 7(a) of the Rules of the United States District Court for the Southern District of California, and objects to the proposed “Order on Petition of Receiver for Order Subordinating Claims of Bank of America and on Supplemental Petition Thereto” (hereinafter referred to as “proposed order”).

I.

The following quoted provisions of the proposed order go beyond the oral order of this Honorable Court as announced at the conclusion of the hearings on March 2 and March 18, 1949:

A. “It appearing to the Court that the objections set forth in the said response of Bank of America National Trust and Savings Association are well founded.” (Lines 10 to 12 on page 2 of the proposed order.) [153]

B. “It further appearing to the Court that the said Receiver is without power or authority to

prosecute the proceedings initiated by the said Petition and Order to Show Cause.” (Lines 16 to 18 of the proposed order, page 2.)

II.

The language contained on Lines 13 to 15, page 2, of the proposed order does not clearly reflect the ruling of the Court as orally announced at the conclusion of the hearings on March 2 and March 18, 1949.

III.

The reasons for the foregoing objections to the proposed order are as follows:

On March 2, 1949, the Bank of America filed a document entitled “Response to Order to Show Cause Re Petition of Receiver for Order Subordinating Claims of Bank of America National Trust and Savings Association” and set forth therein four separate alleged objections to the petition of the Receiver. After the hearing on March 2, 1949, during which the Bank of America urged each of the objections contained in said document, this Honorable Court clearly limited its ruling solely to the objection numbered “2” in the Bank’s said response to the order to show cause. Said objection numbered “2” read as follows:

“2. This Court has no jurisdiction to hear and determine said controversy for the reason that the order confirming the second amended plan of arrangement under Chapter XI of the Bankruptcy Act disposed of and finally determined all matters

in connection with the estate of the above-named debtor except only the jurisdiction and power to determine the amount and validity of claims. The general powers of the Court under the Bankruptcy Act have been exhausted by the [154] order approving the second amended plan of arrangement, and the Court has no jurisdiction to determine controversies between creditors with respect to priority of claims.”

That the Court’s oral ruling was clearly limited to the foregoing contention of the Bank unquestionably appears from the comments of this Court at the conclusion of the hearing held herein on March 2, 1949, particularly at pages 63 to 65 of the Reporter’s Transcript of that hearing. In this connection, your attention is directed to the colloquy between the Court and counsel between lines 9 and 18 on page 65 of said Transcript, where the following appears:

“Mr. Gendel: My position is two-fold: If the Court is going to reserve its ruling purely on the point of jurisdiction, when we seek a review we would limit our point to that, but if the Court would extend its ruling and find the facts alleged in the petition, pursuant to the motion made this morning, are not sufficient to constitute a cause of action then we would be in an embarrassing position. We would like leave to amend.

“The Referee: I will limit my ruling then solely to the lack of jurisdiction.”

In view of the foregoing, the attempt by the Bank

of America in its proposed order to base it upon all the other grounds of objections set forth in its Response goes considerably beyond the above-quoted limitation included by this Court in its ruling.

IV.

The ruling following the hearing on March 18, 1949, on the Receiver's motion "To Reconsider Ruling on Motion of Bank of America Objecting to the Jurisdiction of the Bankruptcy Court Re Subordination Hearing" could not possibly be construed to broaden [155] the original ruling made on March 2, 1949, containing the above-quoted limitation to the jurisdictional objection. This is made clear not only by the fact that all that was involved on the March 18th hearing was the Receiver's motion to reconsider the earlier ruling, but also because of the Court's statement at the conclusion of the March 18th hearing to the effect that the Court was not convinced that it had erred in its earlier ruling and that the motion to reconsider was therefore denied.

V.

There is attached hereto a form of proposed order denying the Receiver's petition for order subordinating the claims of the Bank of America, which we respectfully submit completely and accurately sets forth the ruling of this Honorable Court.

VI.

While we sincerely and strenuously urge the objections hereinabove contained, if the Court should

overrule these objections and see fit to sign an order such as that proposed by the Bank of America, we hereby respectfully request leave to file an amended petition of the Receiver for an order subordinating the claims of the Bank of America, a copy of which is attached hereto, marked Exhibit "A" and by this reference made a part hereof as though set forth in full herein. The reason for this request is that the proposed order contains a recital "that the objections set forth in the said Response of Bank of America National Trust and Savings Association are well founded," and that the said Response contains the following as Item No. 4 thereof:

"4. The facts purportedly alleged in the Receiver's petition and the supplement to the Receiver's petition if true do not constitute lawful grounds for the relief therein asked."

During the hearing on March 2nd, when counsel asked the Court for leave to amend if the Court was ruling that the petition and [156] supplement to petition did not state facts sufficient to constitute a cause of action, the Court indicated that such leave would be granted. This appears in the following language contained between lines 8 and 25: (Transcript page 64).

"Mr. Gendel: At this time, Your Honor, in order to keep the record clear, if the Court is of the opinion that the petitions are at all lacking in specific allegations, we ask leave on behalf of the Receiver to amend the petition and the supplement with reference to the subordination of the Bank of

America. This motion was presented only this morning.

“The Referee: I don’t know why you should not have leave to do that. How long do you want?”

“Mr. Steinmeyer: May I be heard on that point?”

“The Referee: Yes, sir. Don’t you want to give them a chance? Give every man his chance, Mr. Steinmeyer.

“Mr. Steinmeyer: I think that is right, Your Honor. I think the petition now, however, goes so much further than the evidence will show.

“The Referee: I don’t know about that, of course. My only idea was to give them an opportunity to get their petition in a form that would allege something . . .”

It was immediately after the foregoing discussion that the Court expressed its intention to limit its ruling to the jurisdictional question only and not to any alleged failure to state a cause of action.

Dated: March 18, 1949.

Respectfully submitted,

GENDEL AND CHICHESTER,

By /s/ MARTIN GENDEL,

Of Counsel for Receiver.

Filed Mar. 19, 1949.

HUGH L. DICKSON,

Referee. [157]

[Title of District Court and Cause.]

AMENDED PETITION OF RECEIVER FOR
AN ORDER SUBORDINATING CLAIMS
OF BANK OF AMERICA

To The Honorable Hugh L. Dickson, Referee in
Bankruptcy:

Comes now your petitioner, George T. Goggin as receiver of Salsbury Motors, Inc., debtor herein, and with leave of Court first had and obtained files this his Amended Petition for an Order Subordinating the Claims of the Bank of America National Trust & Savings Association, and respectfully represents as follows:

I.

That he is the duly appointed, qualified and acting Receiver in the within Chapter XI proceeding.

II.

That heretofore the Bank of America National Trust & Savings Association (hereinafter referred to as "Bank"), filed a claim in the within bankruptcy proceeding for an amount in the sum of \$601,482.80 plus interest; that the amount now owing to Bank of America is the sum of \$198,-818.44; this sum represents the unpaid balance remaining after allowance of the [174] banker's lien and set-off pursuant to order of Referee Dickson dated March 22, 1948, which order is now on appeal by your petitioner.

III.

That during the month of February, 1946, at or about the time Northrop Aircraft, Inc. (hereinafter called "Northrop"), acquired all the capital stock of the debtor herein, negotiations were carried on by and between the debtor, Northrop, and the Bank of America for the purpose of arranging financing for the debtor. During said negotiations Bank of America requested Northrop, as the parent and owner of all the capital stock of the debtor, to guarantee any loans made by the Bank to the debtor. After Northrop expressly refused to make such guarantee, on or about February 13, 1946, written agreements were entered into by and between the Bank of America, Northrop and the debtor, providing in substance that as a condition precedent to the granting of credit applied for by the debtor, the Bank of America required the execution of an agreement by Northrop to the effect that Northrop, prior to the making of any loans by the Bank, would lend not less than \$600,000 to the debtor, and further, that the indebtedness of the debtor to Northrop should be subordinate to all indebtedness of the debtor to the Bank until all of said indebtedness of the debtor to the Bank had been paid in full. That Northrop did in fact enter into such a subordination agreement with the Bank of America.

IV.

That thereafter and on or about September 4, 1946, the aforesaid written agreements were supplemented by subsequent written agreements between

Northrop and the Bank of America. That the written agreement between said parties dated September 4, 1946, required Northrop to lend or advance \$775,000 to the debtor in addition to the funds theretofore advanced to the [175] debtor, and did subordinate all of Northrop's loans, advances, or indebtedness to the bank's loans to the debtor. That no notice of the existence of the subordination agreement either as originally drafted or as amended was ever given generally to the creditors of the debtor by the bank.

V.

That each of said loan agreements between the debtor and the bank required the debtor to give the bank access to the books and records of the debtor pertaining to the debtor's financial condition and required the debtor to give the bank regular weekly, monthly and yearly financial reports as to the financial condition of the debtor. That the debtor complied with the loan agreement, and in fact gave the bank free access to all books and records of the debtor pertaining to the debtor's financial condition and gave the bank regular weekly, monthly, and yearly financial reports. That at all times hereinafter mentioned the Bank of America had full and complete knowledge of the financial affairs and the true financial condition of the debtor.

VI.

That on or about February 13, 1946, Bank of America loaned to the debtor the sum of \$180,000,

which loan was evidenced by a promissory note bearing said date, which note was secured by a deed of trust dated February 13, 1946, in which the debtor was trustor, the Corporation of America, a California corporation, was trustee, and the Bank of America was beneficiary. That at all of the times hereinafter mentioned said deed of trust was in full force and effect. That the said deed of trust covered the plant of the debtor in the city of Pomona, state of California, and showed on the face thereof that it was given to secure the above-mentioned promissory note in the sum of \$180,000, and also to secure "payment of such additional amounts as may be hereafter owed by beneficiary, or its successor, to the trustor, . . . or any successor in interest of the trustor, with interest thereon, and any [176] other indebtedness or obligation of the trustor, . . . and any present or future demands of any kind or nature which the beneficiary or its successor may have against the trustor, . . . whether created directly, or acquired by assignment, whether absolute or contingent, whether due or not, whether otherwise secured or not, or whether existing at the time of the execution of this instrument, or arising thereafter."

VII.

That the Bank of America knew the following facts at the time of their occurrence and at all times thereafter:

1. That the debtor was insolvent at all times subsequent to August 31, 1946.

2. That in December of 1946 the liabilities of the debtor exceeded its assets in a sum in excess of \$300,000.

3. That from September, 1946, to the date of the commencement of the within proceedings the debtor's books and records showed that it was losing from \$18,000 to \$90,000 during each month of its operations during said period.

4. That the debtor was in default under its loan agreement with the Bank of America at all times after January, 1947.

5. That subsequent to January 1, 1947, all persons who extended credit to the debtor herein did so upon the belief that Northrop would cause any indebtedness of the debtor to be paid.

6. That from and after January 1, 1947, the debtor wrote numerous letters in answer to credit inquiries made by vendors and prospective vendors of the debtor informing the recipients thereof that other vendors had relied upon the financial status of Northrop in extending credit to the debtor and refusing to give any financial information upon the ground that, being a wholly owned subsidiary of Northrop, the financial condition of Northrop should be considered and not that of the debtor.

7. That on or about February 13, 1946, and thereafter, [177] Northrop expressly refused to guarantee the payment of the indebtedness of the debtor herein to the Bank.

8. That at all times subsequent to February 13, 1946, the debtor gave the Bank of America as a credit reference to all persons making credit inquiries.

9. That persons making inquiry of the Bank of America as to the financial condition of the debtor would rely, and did in fact rely, upon the information furnished by the Bank in extending credit to the debtor herein.

10. That persons would rely, and did in fact rely, upon information contained in credit and financial reports pertaining to the debtor as supplied by commercial firms engaged in the business of giving such reports, including the reports made pertaining to the debtor by Dun & Bradstreet.

11. That during the month of May, 1947, a determination had been made by the board of directors of Northrop that no additional funds should be advanced by Northrop to Salsbury.

12. That during the month of May, 1947, and at all times thereafter until the filing of the petition in the within proceeding, Northrop was making strenuous efforts to sell the assets of the debtor.

13. That the debtor, at all times subsequent to January 1, 1947, in the usual course of its business operations maintained a commercial account with the Bank of America with average monthly balances in excess of \$100,000.

14. That at all times subsequent to January 1,

1947, in the usual course of business operations of the debtor, the debtor deposited with the Bank notes and other commercial paper for collection only, and that the value of such notes and commercial paper was in excess of \$150,000 in each month during such period.

VIII.

That from time to time throughout the period from February [178] of 1946 to the date of the filing of the petition commencing the within proceedings the Bank received numerous written and oral inquiries from persons who had been referred to the Bank by the debtor herein concerning the financial condition of the debtor. That the Bank knew that the purpose of such inquiries was to obtain information to be used in determining whether or not credit should be extended to the debtor. That the Bank of America with full knowledge of the facts mentioned in Paragraph VII nevertheless gave such inquirers information to the effect that the debtor was in sound financial condition, that its credit relationship with the Bank of America was good, and that the debtor was a wholly owned subsidiary of Northrop, whose officers and employees were controlling and assisting in the management and operation of the debtor. That the Bank of America did not inform such inquirers of the facts in their knowledge as stated in the preceding paragraphs.

IX.

That during the period from May of 1946 to the date of the commencement of the within proceed-

ings the Bank of America received inquiries from credit agencies such as and including Dun & Bradstreet. That in response to such inquiries the Bank of America informed the inquirers that during the entire period herein mentioned the financial condition of debtor was satisfactory, that it appeared to have an excellent record for trade payment, and that it was a wholly owned subsidiary of Northrop Aircraft, Inc., that its relationship to the Bank of America was satisfactory, and that the debtor was indebted to the Bank of America on a small six figure unsecured loan. That the Bank of America knew that the information furnished to such credit agencies would be included by such agencies in reports furnished by them to persons who would use such reports in determining whether or not to extend credit to debtor herein. That the Bank of America did not inform any of [179] said credit agencies making such inquiry of any of the facts known by the Bank as more fully set forth in paragraph VII. The Bank did not inform such credit agencies of the provisions of the deed of trust, hereinabove quoted.

X.

That the last advance made by the Bank to the debtor herein on an unsecured basis was made on or about November 13, 1946, in the sum of \$100,000. That at all times subsequent to January 1, 1947, the debtor was in default under its written loan agreements with the Bank of America, both with respect

to the monthly payments the debtor was to have made to the bank, and with respect to the maintenance of a minimum working capital by the debtor. That despite said continuing defaults from January 1, 1947, to the date of the commencement of the within proceedings, Bank of America did not at any time exercise any of the rights it had in the event of a default, as are specifically set forth in the aforesaid loan agreements between the Bank and the debtor, the contents of which are too voluminous to mention, but which are well known to the Bank. That during the entire period of the continuing defaults the Bank of America had knowledge that Northrop did not intend to pay any of the debtor's indebtedness to the now existing general unsecured trade creditors, and with the belief on the part of the Bank that only the Bank could compel Northrop to pay any deficiency owing from the debtor to the Bank.

XI.

That in extending credit to the debtor, all of the persons who are the general unsecured and unpaid trade creditors of the debtor herein and whose claims have been allowed by this Court relied upon and were misled by the conduct of and the credit information given by the Bank of America as hereinabove particularly described. [180]

XII.

That at all of the times herein mentioned the Bank of America was familiar with and intended

to rely on the hereinabove quoted provision of the deed of trust, in which the debtor was trustor and the Bank of America was beneficiary, to the effect that it was given to secure all advances, past, present and future, made by the Bank to the debtor. That the Bank of America knew that the value of the real estate described in the deed of trust was considerably in excess of the amount of the promissory note in the sum of \$180,000 which said deed of trust was given to secure.

XIII.

That at all times herein mentioned, the Bank of America intended, in the event of the financial collapse, or the institution of bankruptcy proceedings by or against the debtor, to assert an alleged right of set-off and seizure with respect to all funds in the commercial account of the debtor in the Bank of America.

XIV.

That at all times herein mentioned, the Bank of America intended to assert an alleged banker's lien and a right of seizure with respect to all notes and commercial paper deposited with the Bank of America by the debtor for collection only, in the event of financial collapse or the commencement of bankruptcy proceedings by or against the debtor.

XV.

That at all times herein mentioned, in the event of a financial collapse or the commencement of bank-

ruptcy proceedings by or against the debtor, the Bank of America intended to hold Northrop fully liable for all amounts which might be due the Bank by the debtor, notwithstanding the express refusal of Northrop to guarantee the indebtedness of the debtor to the Bank. [181]

XVI.

That upon being informed, on or about the 19th day of August, 1947, that the officials of Northrop had determined to cause the debtor to file a petition under Chapter XI of the Bankruptcy Act, the Bank of America asserted its alleged right of set-off and thereupon seized the sum of approximately \$162,000.00 which was then in the commercial account of the debtor with the Bank. That thereupon the Bank asserted its alleged banker's lien and converted to its own use the proceeds from the notes and commercial paper deposited with the Bank for collection only by the debtor, from which the Bank of America realized the sum of approximately \$178,000.00. That in asserting its rights under the hereinabove mentioned deed of trust following the commencement of the within proceedings, the Bank contended that the clause thereof hereinabove quoted gave the Bank the right to claim that the deed of trust secured all advances made by the Bank to the debtor in addition to the indebtedness represented by the promissory note in the sum of \$180,000.00, which was the occasion for executing the deed of trust. That there was at the time of the commencement of the within proceedings a balance due in the

sum of approximately \$160,000.00 on the said promissory note. That the real estate described in the deed of trust was then appraised at the sum of \$250,000.00, and the Bank received under the deed of trust \$250,000.00 notwithstanding the fact that only approximately \$160,000.00 was then due on the promissory note which was the only existing indebtedness said deed of trust was given to secure.

XVII.

That upon the commencement of the within proceedings, the Bank of America asserted against Northrop an alleged moral and legal obligation of Northrop to make the Bank whole with respect to any indebtedness of the debtor to the Bank. That as a result of this assertion by the Bank of America, on or about the 24th [182] day of December, 1948, a written agreement was entered into by and between Northrop Aircraft, Inc., and the Bank of America, by the terms of which Northrop paid thereupon to the Bank the sum of \$90,000.00, and further agreed that in the event the dividends ultimately paid by the Receiver herein on the Bank's claim did not equal the full amount of the Bank's claim as then allowed in the sum of \$198,818.44, Northrop agreed to pay to the Bank such additional amount as might be necessary to bring the total payments to the Bank to the full amount of its claim.

XVIII.

That by reason of the foregoing facts, your petitioner is informed and believes and therefore alleges that regardless of the dividends paid out of the within proceedings, the Bank of America intends to receive the full amount of its claim against the debtor. That at all times herein mentioned the Bank knew that despite any financial collapse or bankruptcy proceeding of the debtor herein the Bank would assert an alleged right to be paid one hundred cents on the dollar on any and all indebtedness of the debtor to the Bank. That your petitioner is informed and believes, and therefore alleges, that the Bank of America with full knowledge of all of the facts set forth in the within petition misrepresented said facts in the manner described in this petition to all persons who are the now unpaid general unsecured trade creditors of the debtor in the within proceeding, who in reliance upon said misinformation given to them by the Bank, extended credit to the debtor, and who now, because of the insolvency of the debtor and because of the conduct of the Bank, will not receive more than approximately 50% of their respective claims.

XIX.

That to allow the Bank of America, under the circumstances as hereinabove pleaded, to participate on a parity with the other creditors in the distribution of dividends from the [183] within estate would be unfair, unconscionable, inequitable, and unjust.

XX.

Without prejudice to the position of the Receiver as hereinabove alleged, but in order to present all of the facts and legal contentions now available to the Receiver with reference to the subject matter of subordination of the claims of the Bank of America, your petitioner further alleges as follows:

That as is reflected in Article V of the approved Second Amended Plan of Arrangement, your petitioner, as Receiver, filed objections to the claim of Northrop Aircraft, Inc. (hereinafter referred to as Northrop), and likewise sought affirmative relief against Northrop on the grounds that it was the "alter ego" of the debtor herein and was responsible for any deficiency in the total amount of the claim after the dividends were paid to creditors; Northrop thereafter made an offer of compromise and settlement which was incorporated in the Second Amended Plan of Arrangement and has therein agreed to pay the sum of \$75,000.00 to your petitioner which payment is predicated upon the aforesaid "alter ego" contention of your petitioner; your petitioner believes, and therefore alleges, that the one creditor who had actual knowledge that it was apparently not the intention of Northrop to be responsible for the obligations of Salsbury, was and is Bank of America; the dealings between the Bank of America and Northrop with reference to Salsbury Motors, Inc., loans were dealings reflected in writing and the Bank of America obtained from Northrop an agreement to subordinate the payment

of any of its loans to the debtor herein until Bank of America was paid in full; but no express assumption or guarantee of liability was obtained by Bank of America from Northrop; therefore, since Bank of America knew that Northrop was not guaranteeing the payment of Salsbury claims it would be inequitable to trade creditors to allow Bank of America [184] to participate in any dividend payable to creditors from the said \$75,000.00.

Wherefore, your petitioner prays that this Court make an order directing Bank of America to appear and show cause why: (1) any payment on the claim of Bank of America, against the within estate, as finally allowed, should not be subordinated to the payment of all other creditors; (2) if paragraph (1) is denied, why Bank of America should not be subordinated with reference to the \$75,000.00 hereinabove described to the extent that it does not participate in any dividends from the said \$75,000.00 until all other creditors are paid in full.

Dated this 18th day of March, 1949.

By /s/ GEORGE T. GOGGIN,
Receiver.

By /s/ MARTIN GENDEL,
Of Counsel for Receiver.

State of California,
County of Los Angeles—ss.

George T. Goggin being first duly sworn, deposes and says:

That he is the petitioner in the above entitled

matter; that he has read the foregoing Amended Petition of Receiver for an Order Subordinating Claims of Bank of America and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

By /s/ GEORGE T. GOGGIN.

Subscribed and sworn to before me this 18th day of March, 1949.

[Seal] /s/ IRENE T. GARCIA,
Notary Public in and for the County of Los Angeles, State of California.

Filed April 6, 1949.

HUGH L. DICKSON,
Referee. [186]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF ORDER OF
REFEREE DATED MARCH 19, 1949, ON
PETITION OF RECEIVER FOR ORDER
SUBORDINATING PAYMENT OF DIVI-
DEND ON CLAIMS OF BANK OF AMERICA

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy:

Comes now your petitioner, George T. Goggin, and respectfully represents as follows:

I.

That he is the duly appointed, qualified and acting Receiver in the within Chapter XI reorganization proceeding; that pursuant to and in accordance with the Second Amended Plan of Arrangement and the order confirming said Plan of Arrangement, your petitioner has the right, powers, and authority of a Trustee in Bankruptcy to the same extent as if there had been an order of adjudication and your petitioner had been appointed the Trustee therein.

II.

That your petitioner heretofore filed a duly verified petition on July 30, 1948, entitled, "Petition of Receiver for Order Subordinating Claims of the Bank of America"; that thereafter [189] your petitioner was authorized and permitted to file a verified document dated January 20, 1949, entitled, "Supplement to Petition of Receiver for Order Subordinating Claims of the Bank of America"; that on the basis of the aforesaid petition and supplement, an order to show cause was duly issued as against the Bank of America National Trust & Savings Association, hereinafter designated as "Bank of America," which order was dated July 30, 1948, and was duly served upon the respondent, Bank of America.

III.

That on the 2nd day of March, 1949, a hearing was duly held before the Honorable Hugh L. Dickson, Referee in Bankruptcy, predicated upon the aforesaid petition, supplement thereto, and the order

to show cause; on the aforesaid morning of said hearing the Bank of America served and filed a document entitled, "Response to Order to Show Cause Re Petition of Receiver for Order Subordinating Claims of Bank of America National Trust & Savings Association." The said response to the order to show cause contained the following objections to the Receiver's petition and the supplement thereto:

1. The Bankruptcy Court had no jurisdiction to entertain, hear or determine the controversy alleged in the petition and the supplement thereto;

2. The Receiver had no power or authority to file the petition for order to show cause and/or to obtain the relief therein requested; and

3. The facts alleged in the petition and the supplement thereto did not state a claim against the Bank of America upon which relief could be granted.

Upon the hearing of the order to show cause before the Referee in Bankruptcy on March 2, 1949, the Court orally (and we contend erroneously) ruled that the Bankruptcy Court had no jurisdiction to hear and determine the controversy alleged in the petition and the supplement by reason of the fact that no such power was retained by the Bankruptcy Court in its order confirming the Second Amended Plan of Arrangement.

IV.

That on or about the 4th day of March, 1949, your petitioner duly served and filed the following docu-

mentation: "Notice of Motion of George T. Goggin, Receiver, to Reconsider Ruling on Motion of Bank of America Objecting to the Jurisdiction of the Bankruptcy Court Re: Subordinating Hearing;" said notice of motion was accompanied by points and authorities in support of the same, which points and authorities were dated March 7, 1949, and were served on or about said date. After due service of said document a hearing was held thereon on the 18th day of March, 1949, before the Honorable Hugh L. Dickson, Referee in Bankruptcy, and at said time and place the aforesaid Referee orally denied the motion to reconsider; on the 18th day of March, 1949, the same date as the hearing, counsel for the Bank of America served petitioner on review with a document entitled, "Order on Petition of Receiver for Order Subordinating Claims of the Bank of America and on Supplemental Petition Thereto." Said order appears to have been signed on the next day, March 19, 1949, and prior to the consideration by the said Bankruptcy Court of the document entitled by your petitioner herein as follows, and served upon the Bank of America on the 19th day of March, 1949, "Objections of Receiver to Proposed 'Order on Petition of Receiver for Order Subordinating Claims of the Bank of America and on Supplemental Petition Thereto';" that attached to said objections and made a part thereof by reference as though set forth verbatim is the document designated as, "Amended Petition of Receiver for an Order Subordinating Claims of Bank of America." The said order submitted by the Bank of America

and signed by the Referee went considerably beyond the oral ruling of the Court, in that in addition to sustaining [191] the contention of the Bank on the jurisdictional point, to wit, that the Bankruptcy Court had retained no jurisdiction to determine the controversy, the order further provided that "the objections set forth in the said Response of Bank of America National Trust and Savings Association are well founded."

V.

Thereafter a motion was made by your petitioner on the 2nd and 18th days of March, 1949, whereby the Receiver would be given leave to file an amended petition such as that attached to the "Objections of Receiver to Proposed 'Order on Petition of Receiver for Order Subordinating Claims of the Bank of America and on Supplemental Petition Thereto'." After due notice of said objections, a hearing was held thereon upon the 6th day of April, 1949, before the Honorable Hugh L. Dickson, Referee in Bankruptcy. At the conclusion of said hearing, the Referee overruled the objections made and denied your petitioner's motion to proceed upon the proposed amended petition, although leave was granted "to file" the original of said amended petition.

VI.

The order from which review is sought herein, dated March 19, 1949, reads as follows:

"The above matter came on for hearing on March 2, 1949, upon an Order to Show Cause directed to

Bank of America National Trust and Savings Association, the Petition of Receiver for Order Subordinating Claims of Bank of America, Supplement to Petition of Receiver for Order Subordinating Claims of Bank of America and Response of Bank of America to Order to Show Cause Re Petition of Receiver for Order Subordinating Claims of Bank of America, the Receiver being represented by his attorneys, Gendel and Chichester appearing by [192] Martin Gendel, and the Respondent, Bank of America National Trust and Savings Association, being represented by its attorneys, Hugo A. Steinmeyer and Robert H. Fabian, and the matter having been argued by the respective counsel and submitted to the Court for its decision, and the Court having directed an order denying the petition of the Receiver and directing that the Order to Show Cause thereon be dismissed; and

“George T. Goggin, as Receiver, having filed herein a Motion to Reconsider the Ruling of the Court thereon prior to the entry of such order; and

“The matter having again come on for hearing on March 18, 1949, the Receiver being represented by his attorneys, Martin Gendel and Frank M. Chichester, and the Respondent, Bank of America National Trust and Savings Association, being represented by its attorneys, Hugo A. Steinmeyer and Robert H. Fabian, and the matter having again been argued by respective counsel and the Court being fully advised in the premises; and

“It appearing to the Court that the objections set forth in the said response of Bank of America

National Trust and Savings Association are well founded; and

“It appearing that the Court has no jurisdiction over the controversies and issues raised by the said Petition and response thereto; and

“It further appearing to the Court that the said Receiver is without power or authority to prosecute the proceedings initiated by the said Petition [193] and Order to Show Cause;

“It Is Ordered that the said Petition of the Receiver and Supplemental Petition of Receiver there-to be denied and the Order to Show Cause thereon dismissed.

“Dated this 19 day of March, 1949.

/s/ HUGH L. DICKSON,
Referee.

Approved as to form only:

GENDEL AND CHICHESTER,

By /s/,
Attorneys for Receiver.

Not Approved.”

VII.

That the aforesaid order of March 19, 1949, is erroneous and contrary to law for the following reasons:

A. The Bankruptcy Court has jurisdiction to grant the relief sought by the petitioner on review herein in the aforesaid petition and supplement and the order to show cause dated July 30, 1948, and the proposed amended petition in connection therewith.

1. The debtor's Second Amended Plan of Arrangement expressly reserves for the Bankruptcy Court complete jurisdiction to grant the relief sought by the petitioner and expressly authorizes your petitioner to present such a petition for an order granting the relief sought therein.

(a) In Article I of the Second Amended Plan, the paragraph pertinent to Class D creditors, to which class it is conceded the Bank of America belongs, provides: "The Court to reserve jurisdiction to determine the [194] amount and validity of all claims and the classification of said claims and all objections that may be made in respect thereto, with like effect and power as if the above named debtor has been adjudicated a bankrupt, and George T. Goggin was the acting Trustee in Bankruptcy. That said George T. Goggin, as Receiver and disbursing agent, shall have the right to object to any and all claims with like effect as if he were acting in the capacity of Trustee in Bankruptcy."

See also Article IV, Article V (expressly referring to subordination proceedings in connection with the claim of the Bank of America); Article VI and Article VII.

2. Jurisdiction to hear and determine the controversy was expressly reserved in the order confirming the debtor's Second Amended Plan of Arrangement.

(a) The order confirming the plan expressly incorporates the plan therein and orders the plan confirmed without any limitation. Thus the above

mentioned provisions of the plan reserving jurisdiction of the Bankruptcy Court would apply with equal force to the order confirming the plan.

(b) The order of confirmation (lines 20-29 of page 3 thereof) expressly provide that "this court retains and reserves jurisdiction to determine the amount and validity of all claims of creditors, both secured and unsecured, and the classification of said claims, and all objections [195] that have heretofore been made or that may be made in regard thereto, with a like effect and power as if the above-named debtor had been adjudged a bankrupt and George T. Goggin were the acting Trustee in Bankruptcy; and that George T. Goggin, as Receiver and disbursing agent, shall have the right to object to any and all claims with like effect as if he were acting in the capacity of a Trustee in Bankruptcy." (Emphasis added.)

3. Any apparent conflict between the order confirming the plan and the plan itself must be resolved in favor of the plan. This is so by reason of the fact that the written consents of creditors to the plan were based upon the plan and not the order (see the formal consent made a part of the record in the within proceedings.) Upon confirmation, the plan is in effect a contract between the debtor and the creditors and cannot be varied or altered without the consent of the contracting parties. No notice was ever given to creditors that the plan to which they consented had been or would be in any way limited or modified by the Bankruptcy

Court, as is required by Sections 364 and 365 of the Bankruptcy Act, as amended.

4. Even in the absence of any express reservation of jurisdiction, either in the plan or the order confirming it, the Bankruptcy Court has inherent jurisdiction to supervise the disbursement of the funds deposited with it under the Plan of Arrangement and to direct its order of payment.

B. The Receiver, your petitioner in review, had the power [196] and duty to have the matters set forth in his petition, the supplement thereto, and the amended petition brought to the attention of the Bankruptcy Court and to have the controversy heard and determined.

1. The above-mentioned provisions of the plan and the order confirming it expressly give the Receiver such authority.

2. The provisions of the plan and the order confirming it give the Receiver all the authority of a trustee in bankruptcy and therefore empowers the Receiver to commence a proceeding such as the one here involved.

C. The facts alleged in the original petition and the supplement thereto and in the amended petition state a claim upon which the relief therein requested can be granted.

1. The Bankruptcy Court as a court of equity has the power and duty to direct the order of payment of dividends on allowed claims as between creditors of the same class where for any

reason it would be unfair, unjust, or inequitable to allow all such claimed dividends on an equal pro rata basis. See *Bank of America National Trust and Savings Association v. Erickson* (9th Cir., 1941), 117 F. (2d) 796, 45 A.B.R. (N.S.) 503.

C. The refusal to grant the Receiver leave to amend his pleadings after apparently holding that the original pleadings did not state facts sufficient to constitute a cause of action, constituted an abuse of discretion.

1. The facts set forth in the verified pleading dated March 18, 1949, entitled "Amended [197] Petition of Receiver for an Order Subordinating Claims of The Bank of America" if proved, require the Bankruptcy Court to subordinate the claims of the Bank of America as prayed for by the Receiver. The motions for leave to file such amended petitions were both timely and appropriate.

D. The objections of the Receiver to the proposed form of order, which was the order actually signed by the Referee in Bankruptcy, should have been sustained, and the signing of the order without considering the said objections of the Receiver thereto constituted an error of law and abuse of discretion.

1. The order of March 19, 1949, upon which this petition for review is based, was submitted to counsel for petitioner for approval as to form on March 18, 1949. Pursuant to Rule 7(a) of the Rules of the United States District Court for the Southern

District of California, counsel for the Receiver did not endorse thereon an approval as to form, but within one day of the receipt thereof filed with the Referee a written detailed statement of his objections thereto and the reasons therefor. The Referee had, however, already signed the order apparently prior to receipt of the Receiver's objections to the form thereof.

2. The only real argument presented to the Referee in Bankruptcy on March 2nd and March 18, 1949, centered upon the issue of retention of jurisdiction by the Bankruptcy Court and the authority of George T. Goggin as Receiver having the powers of a trustee to present the petitions for relief from which the within review is being taken; it was error on the part of the Bankruptcy Court to overrule the Receiver's objections [198] to the proposed form of order, for the reason that said order of March 19, 1949, affirmed all of the grounds set forth in the response of Bank of America dated March 2, 1949, which included therein an attack upon the sufficiency of the proposed petition and supplement thereto for order to show cause dated July 30, 1948, now in question. The said petition dated July 30, 1948, and the supplement thereto dated January 20, 1949, in themselves set forth sufficient facts to constitute a cause of action requiring the Bankruptcy Court to subordinate the payment of any dividend to the Bank of America until all other creditors of the same class have been paid in full. Not only did the aforesaid petition and the supplement thereto contain all of the facts necessary, but said facts were

more artfully pleaded in the proposed amended petition of your petitioner on review, dated March 18, 1949, and it was an abuse of discretion to deny the right of your Receiver, petitioner herein, not only to file said amended petition, but to consider the same in connection with the within proceedings. The order complained of, dated March 19, 1949, was directly contrary to the oral ruling made on March 2, 1949, in attempting to extend its effect beyond the question of jurisdiction, which was not argued on March 2, 1949.

IX.

In connection with the within petition for review, your petitioner respectfully requests that the following documents be certified to the District Judge:

1. Proof of claim of the Bank of America, dated December 8, 1947, and denominated as follows: "In Proceedings under [199] Chapter XI, Section 322 of the Bankruptcy Act, Proof of Partially Secured Debt."

2. Motion of Bank of America to file petition for intervention and answer to objections by Receiver to claim of Northrop Aircraft, Inc., dated July 16, 1948.

3. Answer of Bank of America to the aforesaid objections to the claims of Northrop Aircraft, Inc., pursuant to the order of August 5, 1948, granting the motion of Bank of America National Trust and Savings Association for leave to file the petition for intervention and answer to objections by Receiver to claims of Northrop Aircraft, Inc.

4. The debtor's Second Amended Plan of Arrangement under Chapter XI of the Bankruptcy Act.

5. Order of the Referee in Bankruptcy dated July 30, 1948, confirming the debtor's Second Amended Plan.

6. Form of consent to said Second Amended Plan, as contained in the consent of Fairbanks-Morse & Co.

7. The petition of George T. Goggin as Receiver dated July 30, 1948, for order subordinating the claims of Bank of America.

8. Supplement to petition of George T. Goggin as Receiver for order subordinating claims of Bank of America, dated January 20, 1949.

9. Order to show cause issued by the Referee re Bank of America dated July 30, 1948.

10. Agreement of Indemnity of Northrop Aircraft, Inc., and order of court approving the same, dated November 19, 1948.

11. Document entitled, "Release and Satisfaction of Indemnity Agreement" dated December 23, 1948.

12. Document filed by Bank of America dated March 2, 1948, designated, "Response to order to Show Cause Re Petition of Receiver for Order Subordinating Claims of Bank of America [200] National Trust and Savings Association."

13. Reporter's transcript of hearing on objections to claim of Bank of America, said hearing held on March 2, 1949.

14. Notice of Motion by George T. Goggin, as Receiver, dated March 4, 1949, to reconsider ruling on motion of Bank of America, objecting to the jurisdiction of the Bankruptcy Court re subordination hearing.

15. Points and Authorities dated March 7, 1949, in support of motion of George T. Goggin as Receiver to reconsider ruling of Referee on the jurisdiction point involving the subordination of Bank of America.

16. Order of the Referee in Bankruptcy dated March 19, 1949, on petition of receiver for order subordinating claims of Bank of America and on supplemental petitions thereto.

17. Court reporter's transcript of hearing on the motion of Receiver to reconsider ruling on motion of Bank of America, objecting to the jurisdiction of the Bankruptcy Court, re subordination hearing, said hearing being held on March 18, 1949.

18. Objections of Receiver to proposed "Order on Petition of Receiver for Order Subordinating Claims of Bank of America, and on Supplement to Petition Thereto."

19. Court reporter's transcript of hearing of April 6, 1949, overruling the objections of the Receiver to the proposed order on the Bank of Amer-

ica ruling and the refusal of the Referee to consider the amended petition.

20. Original verified document dated March 18, 1949, entitled, "Amended Petition of Receiver for an Order Subordinating Claims of Bank of America."

21. Order of March 24, 1949, extending time within which to petition for review to the 14th day of April, 1949.

22. Order of the Referee in Bankruptcy dated April 7, 1949, extending the time within which to petition for review. [201]

23. The within Petition for Review.

Wherefore, your petitioner prays for a review of the order of the Referee in Bankruptcy dated March 19, 1949, by a Judge of the United States District Court and that said order be reversed and set aside, and that the Referee in Bankruptcy be directed to receive, consider and determine on its merits, after hearing evidence, the verified document dated March 18, 1949, entitled, "Amended Petition of Receiver for an Order Supporting Claim of Bank of America.

Dated: this 18th day of April, 1949.

/s/ GEORGE T. GOGGIN,
Receiver and Petitioner.

Of counsel

/s/ MARTIN GENDEL.

For Receiver and Petitioner on Review.

State of California,
County of Los Angeles—ss:

George T. Goggin, Receiver, being by me first duly sworn, deposes and says that he is the Petitioner in Review in the above-entitled action; that he has read the foregoing Petition for Review of Order of Referee Dated March 19, 1949, on Petition of Receiver for Order Subordinating Payment of Dividend on Claims of Bank of America, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters he believes it to be true.

/s/ GEORGE T. GOGGIN.

Subscribed and sworn to before me this 19th day of April, 1949.

[Seal] /s/ M. ALLIS,
Notary Public in and for said County and State of
California.

Affidavit of service by mail attached.

Filed April 19, 1949.

HUGH L. DICKSON,
Referee. [203]

[Title of District Court and Cause.]

IN PROCEEDINGS UNDER CHAPTER XI,
SECTION 322, OF THE BANKRUPTCY
ACT, PROOF OF PARTIALLY SECURED
DEBT

At Los Angeles in the Southern District of California on September 8, 1947, came R. G. Hawley of the County of Los Angeles in said District, personally known to me and made oath and says:

That he is an officer, to wit, Assistant Cashier of Bank of America National Trust and Savings Association, a corporation, to wit, a national banking association, organized and existing under and by virtue of the laws of the United States and carrying on business in the City of Los Angeles, County of Los Angeles, and elsewhere in the State of California; that this proof of debt is made by deponent as agent of said association, duly authorized to make such proof, and that he has personal knowledge of the facts herein deposed.

That the said Salsbury Motors, Inc., a corporation, who on the 20th day of August, 1947, filed a petition under the provisions of Chapter XI, Section 322 of the Acts of Congress relating to bankruptcy, was on the date said petition was filed indebted to claimant in the principal sum of \$601,482.80, plus interest on \$159,300.00 of said amount at the rate of 4½% per annum from August 13, 1947, and is now indebted to claimant in the sum of \$509,267.18, plus interest on \$159,300.00 of said sum at 4½% per annum from August 13, 1947,

and plus interest on \$349,967.18 of said sum of 3% per annum from August 20, 1947. That said indebtedness is represented by negotiable instruments, to wit, promissory notes, and that no judgment has been rendered thereon, and that the nature and cause of said indebtedness is as follows:

Promissory notes, made, executed and delivered to claimant by debtor in the total aggregate principal amount of \$780,000.00; that copies of said promissory notes are attached hereto, marked Exhibits "A" to "F," inclusive, and made a part hereof; that the promissory note marked Exhibit "A" bears interest at the rate of $4\frac{1}{2}\%$ per annum; that the promissory notes marked Exhibits "B" to "F," inclusive, bear interest at the rate of 3% per annum; that at the time of the execution of the note marked Exhibit "A" and as security for same the debtor, as trustor, made, executed and delivered to Corporation of America, a California corporation, as trustee for claimant, as beneficiary, a deed of trust covering certain real property situated in the County of Los Angeles, a copy of which deed of trust is attached hereto and marked Exhibit "G," which deed of trust was on the 14th day of February, 1946, recorded in Book 22818, Page 139 of Records of the County Recorder of Los Angeles County. It is expressly provided under the terms of said deed of trust that it shall be security for any and all other indebtedness and obligations of trustor to beneficiary whether present or future; that claimant is informed and believes and on such information and belief states that the value of the real

property and improvements located thereon covered by said deed of trust is in the amount of \$300,000.00. Claimant does not waive any of its right in and to said security in the event that the value of said security exceeds said sum of \$300,000.00.

That, in addition to the aforementioned security, claimant [247] had in its possession on the date of the filing of the petition herein certain notes, drafts and bills of lading of debtor covering merchandise sold by debtor, which notes, drafts and merchandise on the date of the filing of the petition herein had a face value of \$175,519.48. Claimant holds said notes, drafts and bills of lading under its right of offset, counterclaims and bank's lien.

That, since the date of the filing of the petition herein, claimant has received as collections on said drafts the sum of \$92,215.62, which sum has been applied by claimant on the principal indebtedness owing by debtor to claimant and that the face value of the drafts, notes and merchandise now held by claimant is \$83,303.86. That the total estimated value of security now held by claimant amounts to \$383,303.86 and the estimated amount of the principal of the debt owing to claimant, which is unsecured at this time, is \$125,963.32.

That there are no offsets or counterclaims to said debt and claimant does not hold and has not, nor has any person by its order or to deponent's knowledge or belief for its use, hold any security or securities for said indebtedness, except the security and offsets, counterclaims and banker's right of lien as hereinabove set forth.

That by filing this claim claimant does not waive any right to dispose of the collateral held by claimant to secure said indebtedness according to the terms of any agreement pursuant to which such security was delivered to claimant and pursuant to claimant's right of offset, counterclaim and banker's lien, and this claim is filed only as an alternative to the security held and it is this claimant's intention to dispose of this collateral and to file an amended claim for any indebtedness which may exist after the application of moneys received after the [248] disposition of said collateral.

/s/ R. G. HAWLEY.

Subscribed and sworn to before me this 8th day of September, 1947.

[Seal] /s/ CLARA K. DEN,
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT "A"

Corporation Instalment Real Estate Note
(Principal Payable in Instalments—Interest
Separately)

Los Angeles, Calif.,
February 13, 1946.

\$180,000.00

For value received, Salsbury Motors, Inc., a corporation promises to pay in lawful money of the United States of America, to the order of the Bank of America at its Los Angeles Main Branch in this city the principal sum of One Hundred Eighty

Thousand Dollars, with interest payable quarterly, beginning August 13, 1946, in like lawful money from date on deferred balances until paid at the rate of Four and One-Half per cent per annum; and said principal sum payable as follows: Three Thousand Six Hundred Dollars, (\$3,600.00), on the 13th day of August, 1946, and Three Thousand Six Hundred Dollars (\$3,600.00) on the 13th day of November, 1946, and Four Thousand Five Hundred Dollars (\$4,500.00) on the 13th day of February, 1947, and Four Thousand Five Hundred Dollars, (\$4,500.00), on the 13th day of each and every third month thereafter until the 13th day of February, 1956, on which said date the entire balance of principal and interest then unpaid shall become due and payable.

If the interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal. If default be made in the payment when due of any part or instalment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.

A deed of trust dated February 13, 1946, secures the indebtedness evidenced by this note.

In Witness Whereof, the said Corporation has caused this note to be executed by its officers thereunto duly authorized and directed by a resolution of its Board of Directors duly passed and adopted

by a majority of said Board at a meeting thereof duly called, noticed, and held.

[Seal] SALSBUry MOTORS, INC.,
a Corporation,

By /s/ DON I. CARROLL,
President,

By /s/ M. W. LOWERY,
Secretary. [250]

Salsbury Motors, Inc.			RE-8159	
Date	Interest Paid Amount	Paid to	Paid on Account of Amount	Principal Balance
				180,000.00
9-13-46	-----	-----	3,600.00	176,400.00
10-15-46	385.65	10- 1-46		
11-13-46	786.90	11-13-46	3,600.00	172,800.00
12-19-46	535.50	12-13-46		
1-20-47	535.50	1-13-47		
2-28-47	603.00	2-13-47	4,500.00	168,300.00
5-14-47	1,901.80	5-13-47	4,500.00	163,800.00
8-15-47	1,842.75	8-13-47	4,500.00	159,300.00

EXHIBIT "B"

Salsbury Motors

UT 175930

PROMISSORY NOTE

Los Angeles, California,
February 13, 1947.

\$100,000.00.

For Value Received, the undersigned, Salsbury Motors, Inc., a corporation, promises to pay in lawful money of the United States of America to the order of Bank of America National Trust and Savings Association at its Main Branch in this city the

principal sum of one hundred thousand dollars (\$100,000.00), with interest payable at maturity in like lawful money from the date hereon until paid at the rate of three per cent (3%) per annum, and said principal sum payable on May 14, 1947.

If interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal.

This note evidences a loan made pursuant to a Loan Agreement between the payee and the undersigned dated February 18, 1946, and subsequent amendments thereto.

[Seal] SALSBURY MOTORS, INC.,

By /s/ GAGE H. IRVING,

Vice President and

General Manager,

By /s/ G. R. CASE,

Secretary and Treasurer.

EXHIBIT C

UT 169355.

Salsbury Motors, Inc.

Los Angeles, California,

June 27, 1946.

\$100,000.00.

For Value Received, the undersigned, Salsbury Motors, Inc., a corporation, promises to pay in lawful money of the United States, to the order of Bank of America National Trust and Savings Association at its Main Branch in this city the principal sum of \$100,000.00 (one hundred thousand

dollars) with interest payable quarterly in like lawful money from the date hereof on deferred balances until paid at the rate of three per cent (3%) per annum, said principal sum payable as follows:

\$20,000.00 on or before September 30, 1947,

\$30,000.00 on or before September 30, 1948,

\$30,000.00 on or before September 30, 1949, and

\$20,000.00 on or before September 30, 1950,

On which date the entire balance of principal and interest then unpaid shall become due and payable.

If interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal. If default be made in the payment when due of any part or installment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.

This note evidences a loan made pursuant to a loan agreement between the payee and the undersigned dated February 18, 1946.

[Seal] SALSBUry MOTORS, INC.,

By /s/ DON I. CARROLL,
President,

By /s/ M. W. LOWERY,
Secretary. [253]

EXHIBIT D

UT 170049.

Salsbury Motors, Inc.

Los Angeles, California,

July 16, 1946.

\$100,000.00.

For Value Received, the undersigned, Salsbury Motors, Inc., a corporation, promises to pay in lawful money of the United States, to the order of Bank of America National Trust and Savings Association at its Main Branch in this city the principal sum of \$100,000.00 (one hundred thousand dollars) with interest payable quarterly in like lawful money from the date hereof on deferred balances until paid at the rate of three per cent (3%) per annum, said principal sum payable as follows:

\$20,000.00 on or before September 30, 1947,
\$30,000.00 on or before September 30, 1948,
\$30,000.00 on or before September 30, 1949, and
\$20,000.00 on or before September 30, 1950,

On which date the entire balance of principal and interest then unpaid shall become due and payable.

If interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal. If default be made in the payment when due of any part or installment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.

This note evidences a loan made pursuant to a loan agreement between the payee and the undersigned dated Feb. 18, 1946.

[Seal] SALSBUry MOTORS, INC.,

By /s/ DON I. CARROLL,
President,

By /s/ M. W. LOWERY,
Secretary. [254]

EXHIBIT E

UT 170518.

Los Angeles, California,
August 1, 1946.

\$100,000.00.

For Value Received, the undersigned, Salsbury Motors, Inc., a corporation, promises to pay in lawful money of the United States, to the order of Bank of America National Trust and Savings Association at its Main Branch in this city the principal sum of \$100,000.00 (one hundred thousand dollars) with interest payable quarterly in like lawful money from the date hereof on deferred balances until paid at the rate of three per cent (3%) per annum, said principal sum payable as follows:

\$20,000.00 on or before September 30, 1947,
\$30,000.00 on or before September 30, 1948,
\$30,000.00 on or before September 30, 1949, and
\$20,000.00 on or before September 30, 1950,

On which date the entire balance of principal and interest then unpaid shall become due and payable.

If interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal. If default be made in the payment when due of any part or installment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.

This note evidences a loan made pursuant to a loan agreement between the payee and the undersigned dated February 18, 1946.

[Seal] SALSBUURY MOTORS, INC.,

By /s/ DON I. CARROLL,
President,

By /s/ M. W. LOWERY,
Secretary. [255]

EXHIBIT F

UT 170818.

Los Angeles, California,
August 15, 1946.

\$200,000.00.

For Value Received, the undersigned, Salsbury Motors, Inc., a corporation, promises to pay in lawful money of the United States, to the order of Bank of America National Trust and Savings Association at its Main Branch in this city the principal sum of \$200,000.00 (two hundred thousand dollars) with interest payable quarterly in like lawful money from the date hereof on deferred balances until paid at the rate of three per cent (3%) per annum, said principal sum payable as follows:

\$40,000.00 on or before September 30, 1947,
\$60,000.00 on or before September 30, 1948,
\$60,000.00 on or before September 30, 1949, and
\$40,000.00 on or before September 30, 1950,

On which date the entire balance of principal and interest then unpaid shall become due and payable.

If interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal. If default be made in the payment when due of any part or installment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.

This note evidences a loan made pursuant to a loan agreement between the payee and the undersigned dated February 18, 1946.

[Seal] SALSBUURY MOTORS, INC.,

By /s/ DON I. CARROLL,

President.

By /s/ M. W. LOWERY,

Secretary. [256]

EXHIBIT G

This Deed of Trust, made this 13th day of February, 1946, between Salsbury Motors, Inc., a corporation, as Trustor, ("Trustor" to be interpreted as "Trustors" where context requires), Corporation of America, a California corporation, as Trustee, and Bank of America National Trust and Savings Association, a national banking association, as Beneficiary,

Witnesseth: That Trustor Irrevocably Grants, Transfers and Assigns to Trustee, in Trust, With Power of Sale, the following described property situate in the County of Los Angeles, State of California, to wit:

The Southwest quarter of Block 208 of Pomona Tract, in the City of Pomona, as per map recorded in Book 3, Page 95 of Miscellaneous Records, in the office of the County Recorder of said County; areas computed to centers of adjoining streets.

Except therefrom such portion as may have been heretofore conveyed to the Southern Pacific Railroad Company, including all appurtenances and easements used in connection therewith, all water and water rights (whether riparian, appropriative, or otherwise, and whether or not appurtenant) used in connection therewith, all shares of stock evidencing the same, pumping stations, engines, machinery, pipes and ditches, including also all gas, electric, cooking, heating, cooling, air conditioning, refrigeration and plumbing fixtures and equipment which have been or may hereafter be attached in any manner to any building now or hereafter on the said property, or to the said property, and also the rents, issues and profits thereof, Subject, However, to the right, power and authority hereinafter given to and conferred upon the Beneficiary to collect and apply such rents, issues and profits.

For the Purpose of Securing: (1) Payment of the sum of \$180,000.00 with interest thereon according to the terms of a promissory note or notes of even date herewith, made by Trustor, payable to the

order of the Beneficiary, and extensions or renewals thereof; (2) payment of such additional amounts as may be hereafter loaned by Beneficiary or its successor to the Trustor or any of them, or any successor in interest of the Trustor, with interest thereon, and any other indebtedness or obligation of the Trustor, or any of them, and any present or future demands of any kind or nature which the Beneficiary or its successor may have against the Trustor, or any of them, whether created directly, or acquired by assignment, whether absolute or contingent, whether due or not, whether otherwise secured or not, or whether existing at the time of the execution of this instrument, or arising thereafter; (3) performance of each agreement of Trustor herein contained; and (4) payment of all sums to be made by Trustor pursuant to the terms hereof.

To Protect the Property and Security Granted by This Deed of Trust, Trustor Agrees:

(a) Properly to care for and keep said property and the buildings and improvements situate thereon in good condition and repair; to underpin and support, when necessary, any building or other improvement situate thereon, and otherwise to protect and preserve same; not to remove or demolish any building or improvement situate thereon; to complete or restore promptly, and in good and workmanlike manner, any building or improvement which may be constructed, damaged or destroyed thereon, and pay in full all costs incurred therefor;

not to commit or permit waste of the property; to comply with all laws, covenants, conditions or restrictions affecting the property; to provide and maintain fire (and if required by Beneficiary, earthquake and other) insurance satisfactory to and with loss payable solely to Beneficiary, and to deliver all policies to Beneficiary, which delivery shall constitute assignment to Beneficiary of all return premiums; to appear in and defend, without cost to Beneficiary or Trustee, any action or proceeding purporting to affect the security hereunder, or the rights or powers of Beneficiary or Trustee, and, when required by Trustee [257] or Beneficiary, to commence and maintain any action or proceeding necessary to protect such security and such rights or powers; and should Trustee or Beneficiary elect to appear in, defend, or commence and maintain any such action or proceeding, to pay all their costs and expenses, including attorney fees; to pay before delinquency, all taxes, assessments and charges affecting the property, including assessments on appurtenant water stock; to pay when due all encumbrances, charges and liens which appear to be prior or superior hereto; to pay all costs, fees and expenses of this trust; if said property be agricultural, to farm said land in an approved and husbandmanlike manner, and to keep all trees, vines and crops on said land properly cultivated, irrigated, fertilized, sprayed and fumigated; to replace all dead or unproductive vines or trees with new ones, and to keep all buildings, fences, ditches, canals, wells and other farming improvements on

said premises in first-class condition, order and repair.

(b) Should Trustor fail to make any payment or do any act as herein provided, then Beneficiary or Trustee (but without obligation so to do, and without notice to or demand upon Trustor, and without releasing Trustor from any obligation hereunder) may make or do the same, and may pay, purchase, contest or compromise any encumbrance, charge or lien, which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability and expend whatever amounts in its absolute discretion it may deem necessary therefor. All sums so incurred or expended by Beneficiary or Trustee shall be without demand immediately due and payable by Trustor, and shall bear interest at the rate of ten per cent per annum, and be secured hereby.

It Is Mutually Agreed That:

1. Should the property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire or earthquake, or in any other manner, Beneficiary shall be entitled, at its option, to commence, appear in and prosecute in its own name, any action or proceeding, or to make any compromise or settlement, in connection with such taking or damage, and to obtain all compensation, awards or other relief therefor. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of insurance affecting

said property, are hereby assigned to Beneficiary, who may release any money so received by it, or apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages and rights of action and proceeds, as Beneficiary or Trustee may require. The Trustee or Beneficiary may enter upon the property at any time during the existence of this trust for the purpose of inspection, or for the accomplishment of any of the purposes hereof.

2. By accepting payment of any sum hereby secured after its due date, or after the filing of notice of default and of election to sell, Beneficiary shall not waive its right to require prompt payment when due of all other sums so secured, or to declare default for failure so to pay, or to proceed with the sale under any such notice of default and of election to sell, for any unpaid balance of said indebtedness. If Beneficiary holds any additional security for any obligation secured hereby, it may enforce the sale thereof at its option, either before, contemporaneously with, or after the sale is made hereunder, and on any default of Trustor, Beneficiary may, at its option, offset against any indebtedness owing by it to Trustor, the whole or any part of the indebtedness secured hereby.

3. Without affecting the liability of any person, including Trustor, for the payment of any indebtedness secured hereby, or the lien of this deed of trust on the remainder of the property for the full amount of any indebtedness unpaid, Beneficiary

and Trustee are respectively empowered as follows: Beneficiary may from time to time and without notice (a) release any person liable for the payment of any of the indebtedness, (b) extend the time or otherwise alter the terms of payment of any of the indebtedness, (c) accept additional security therefor of any kind, including deeds of trust or mortgages, (d) alter, substitute or release any property securing the indebtedness; Trustee may, at any time, and from time to time, upon the written request of Beneficiary (a) consent to the making of any map or plat of the property, (b) join in granting any easement or creating any restriction thereon, (c) join in any subordination or other agreement affecting this deed of trust or the lien or charge thereof, (d) reconvey, without any warranty, all or any part of the property.

4. Upon payment in full of all sums secured hereby, and performance of all obligations of the Trustor hereunder, the Trustee shall reconvey, without warranty, the estate vested in it hereby. The grantee in any reconveyance made pursuant to this deed of trust may be described as "the person or persons legally entitled thereto," and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof. Upon default by Trustor in the payment of any indebtedness secured hereby, or in the performance of any agreement hereunder, or upon conveyance by Trustor of said property, or upon the divestment in any manner of his title thereto, all sums secured hereby

shall immediately become due and payable at the option of the Beneficiary. In the event of default, Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of its election to cause to be sold the property herein described, to satisfy the obligations secured hereby, and shall cause such notice to be recorded in the office of the Recorder of each county wherein said property, or some part thereof, is situated. Beneficiary may rescind any such notice before Trustee's sale by executing a notice of rescission and recording the same. The recordation of such notice shall constitute also a cancellation of any prior declaration of default and demand for sale, and of any acceleration of maturity of indebtedness affected by any prior declaration or notice of default. The exercise by Beneficiary of the right of rescission shall not constitute a waiver of any default then existing or subsequently occurring, nor impair the right of the Beneficiary to execute other declarations of default and demand for sale, or notices of default and of election to cause the property to be sold, nor otherwise affect the note or deed of trust, or any of the rights, obligations or remedies of the Beneficiary or Trustee hereunder.

5. At least three months having elapsed between the recordation of the notice of default and the date of sale, Trustee, having first given notice of sale as then required by law, and without demand on Trustor, shall sell the property at the time and place of sale fixed by it in the notice of sale, either as a

whole or in separate parcels, and in such order as the Trustee may determine, at public auction to the highest bidder for cash, in lawful money of the United States of America, payable at the time of sale. Trustee may postpone sale of all or any portion of the property by public announcement at the time of sale, and from time to time thereafter may postpone the sale by public announcement at the time fixed by the previous postponement, and without further notice it may make such sale at the time to which the same shall be so postponed. Trustee shall deliver to the purchaser its deed conveying the property so sold, but without any covenant or warranty, expressed or implied. The recital in any such deed of any matters or facts, stated either specifically or in general terms, or as conclusions of law or fact, shall be conclusive proof of the truthfulness thereof. Any person, including Trustor, Trustee or Beneficiary, may purchase at the sale. After deducting all costs, fees and expenses of Trustee and of this trust, including costs of evidence of title in connection with the sale, the Trustee shall apply the proceeds of the sale to the payment of all sums then secured hereby, in such order and manner as may be required by the Beneficiary; the remainder, if any, to be paid to the person or persons legally entitled thereto. If Beneficiary shall elect to bring suit to foreclose this deed of trust in the manner and subject to the provisions, rights and remedies relating to the foreclosure of a mortgage, Beneficiary shall be entitled to a reasonable

sum to be fixed by the court as attorney fees expended in the prosecution of said action.

6. As additional security, Trustor hereby gives to and confers upon Beneficiary the right, power and authority, during the continuance of these trusts, to collect the rents, issues and profits of said property, or of any personal property [258] located thereon, with or without taking possession of the property affected hereby, reserving unto the Trustor the right, prior to any default by Trustor in payment of any indebtedness secured hereby, or in the performance of any agreement hereunder, to collect and retain such rents, issues and profits as they accrue and become payable. Upon any such default Beneficiary may at any time, without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, and in its own name sue for or otherwise collect such rents, issues and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine; also perform such acts of repair, cultivation, irrigation or protection, as may be necessary or proper to conserve the value of the property; also lease the same or any part thereof for such rental, term, and upon such conditions as its judgment may dictate; also prepare for

harvest, harvest, remove, and sell any crops that may be growing upon the premises, and apply the proceeds thereof upon the indebtedness secured hereby. The entering upon and taking possession of said property, the collection of such rents, issues and profits, and the application thereof as aforesaid, shall not waive or cure any default or notice of default hereunder, or invalidate any act done pursuant to such notice. Trustor also assigns to Trustee, as further security for the performance of the obligations secured hereby, all prepaid rents and all moneys which may have been or may hereafter be deposited with said Trustor by any lessee of the premises herein described, to secure the payment of any rent, and upon default in the performance of any of the provisions hereof, Trustor agrees to deliver such rents and deposits to the Trustee.

7. Any Trustor who is a married woman hereby expressly agrees that recourse may be had against her separate property for any deficiency after the sale of the property hereunder.

8. Should proceedings be instituted to register title of the property under any land title law, Trustor will pay upon demand all sums expended by Trustee or Beneficiary, including attorney fees, and forthwith deliver to Beneficiary all evidence of title.

9. The pleading of any statute of limitations as a defense to any and all obligations secured by this deed of trust is hereby waived to the full extent permissible by law.

10. Trustor further agrees that Beneficiary may from time to time and for periods not exceeding one year, in behalf of the Trustor, renew or extend any promissory note secured hereby, and said renewal or extension shall be conclusively deemed to have been made when endorsed on said promissory note or notes by the Beneficiary in behalf of the Trustor.

11. Beneficiary may, from time to time, substitute another Trustee in the place of the Trustee herein named. Each such appointment and substitution, and without conveyance to the successor trustee, the latter shall be vested with all the title, powers and duties conferred upon the Trustee herein named. Each such appointment and substitution shall be made by written instrument executed by the Beneficiary, containing reference to this deed of trust sufficient to identify it, which, when recorded in the office of the County Recorder of the county or counties in which the property is situated, shall be conclusive proof of the proper appointment of the successor trustee.

12. This deed of trust shall inure to and bind the heirs, devisees, legal representatives, successors and assigns of the parties hereto. All obligations of each Trustor hereunder are joint and several. The rights or remedies granted hereunder, or by law, shall not be exclusive, but shall be concurrent and cumulative.

If a mailing address is set forth opposite any

Trustor's signature hereto, and not otherwise, the undersigned Trustor shall be deemed to have requested that a copy of any notice of default, and of any notice of sale hereunder, be mailed to said Trustor at said address.

Signature of Trustor.

[Seal] SALSBUry MOTORS, INC.,
a Corporation.

By /s/ DON I. CARROLL,
President,

By /s/ M. W. LOWERY,
Secretary.

State of California,
County of Los Angeles—ss:

On this 13th day of February, 1946, before me Gladys A. Hultman, a Notary Public in and for said Los Angeles County, personally appeared Don I. Carroll known to me to be the President and M. W. Lowery, known to me to be the Secretary of the Salsbury Motors, Inc., the Corporation that executed the within instrument, and also known to me to be the person who executed the within instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

Witness my hand and official seal.

[Seal] /s/ GLADYS A. HULTMAN,
Notary Public in and for said Los Angeles County
and State.

[Endorsed]: Filed June 20, 1949, U.S.D.C. [259]

[Title of District Court and Cause.]

OBJECTIONS OF PETITIONER ON REVIEW
TO PROPOSED "ORDER" DENYING PE-
TITION FOR REVIEW IN RE PETITION
FOR ORDER SUBORDINATING CLAIMS
OF BANK OF AMERICA"

Comes Now George T. Goggin, Receiver and Petitioner on Review and pursuant to Rule 7(a) of the Rules of the United States District Court for the Southern District of California, makes these objections to the proposed "Order Denying Petition for Review in Re Petition for Order Subordinating Claims of Bank of America." A copy of said proposed Order was served upon counsel for the Receiver on December 27, 1949, at 1:30 p.m., and at which time pursuant to Rule 7(a), counsel for the Receiver acknowledged receipt of a copy thereof on the original proposed Order.

The Receiver objects to the proposed Order on the ground that it fails to mention or dispose of the issues raised by this Review with respect to the "Amended Petition of Recevier for an Order Subordinating Claims of Bank of America" filed with the Referee on April 6, 1949, and transmitted to this Court as [325] Document No. 20 with the Referee's Certificate on Review. In the Petition for Review filed on or about April 19, 1949, one of the alleged errors complained of by the Petitioner was "the refusal to grant the Receiver leave to amend his pleadings after apparently holding that the original pleadings did not state facts sufficient to

constitute a cause of action'' (Line 28 of Page 9 and Line 18 of Page 11 of Petition for Review and Order of Referee dated March 19, 1949).

The issues with respect to the Amended Petition were extensively referred to in the briefs filed by both parties to this Review (Pages 13 to 16 and Pages 33 to 37 of Receiver's Points and Authorities and Pages 4 to 6 of the Bank's Points and Authorities).

Notwithstanding the proper presentation of the legal questions pertaining to the Amended Petition presented to the Court by this Review, the proposed Order submitted by the prevailing party makes no mention whatsoever of the Amended Petition. In the portion of the Bank's Points and Authorities above mentioned referring to the Amended Petition, it is argued that the Amended Petition was not properly before the Court. The contrary was contended by the Receiver. It is respectfully submitted that the Receiver is entitled to a ruling with respect to the Amended Petition on Review. The proposed Order does not indicate whether or not this Court has adopted the Bank's contention that the Amended Petition was not properly before the Court or whether this court considered the Amended Petition and affirmed the Referee on the basis of the original Petition, the Supplement thereto, as well as the Amended Petition. The failure of the proposed Order to make any reference to the Amended Petition is particularly significant by reason of the fact that all of the other pleadings are specifically mentioned in the proposed Order (Lines 18 to 23

of [326] Page 1 and Lines 6 to 9 of Page 2). By reason of the fact that an appeal to the Court of Appeals for the Ninth Circuit is contemplated to review the Order to be entered by this Court we strenuously urge that the Receiver is entitled to a ruling with respect to the Amended Petition so that the Court of Appeals will have the complete ruling of this Court before it.

Dated: this 30th day of December, 1949.

Respectfully submitted,

GENDEL & RASKOFF

By /s/ H. MILES RASKOFF,

Attorneys for Receiver.

Affidavit of service by mail attached.

[Endorsed]: Filed Dec. 30, 1949, U.S.D.C.

In the United States District Court for the Southern District of California, Central Division
No. 45,207-B

In the Matter of:

SALSBURY MOTORS, INC., a Corporation,
Debtor.

ORDER DENYING PETITION FOR REVIEW
IN RE PETITION FOR ORDER SUB-
ORDINATING CLAIMS OF BANK OF
AMERICA

The above matter came on for hearing on December 12, 1949, upon the petition of the Receiver,

George T. Goggin, to review an order of the Honorable Referee Hugh L. Dickson entered March 19, 1949. The order of the Referee was made upon the petition of the Receiver for an order subordinating claims of Bank of America, a supplement to the petition of the Receiver for an order subordinating claims of Bank of America, and an order to show cause issued thereon, and the response of the Bank of America to the order to show cause, petition, and supplemental petition. The Receiver was represented by his attorneys, Gendel & Raskoff, appearing by H. Miles Raskoff, and the respondent Bank of America National Trust and Savings Association being represented by its attorneys, Hugo A. Steinmeyer and Robert H. Fabian, appearing by Robert H. Fabian, and the matter having been argued by the respective counsel and points and authorities filed by both parties, and the matter submitted to the Court for its decision; and

It appearing to the Court that the objections set forth [329] in the aforesaid response of Bank of America National Trust and Savings Association are well founded; and

It appearing that the Court has no jurisdiction over the controversies and issues raised by the said petition, supplement thereto, and response thereto; and

It further appearing to the Court that the said Receiver is without power or authority to prosecute the proceedings initiated by the said petition and supplement thereto and order to show cause issued

thereon; and the Court having fully considered the arguments of counsel, points and authorities, and the aforesaid order of the Referee, and the undersigned United States District Judge being in agreement with said Referee as to said order;

It Is Ordered That the petition of the Receiver and supplemental petition thereto be denied, and the order to show cause thereon be dismissed, and

It Is Further Ordered That the petition of the Receiver for review of the order of the Referee, dated March 19, 1949, be denied and that the order of the Referee be affirmed.

Dated this 6th day of January, 1950.

/s/ HARRY C. WESTOVER,
United States District Judge.

Judgment entered Jan. 20, 1950.

Docketed Jan. 20, 1950.

Receipt of copy acknowledged.

[Endorsed]: Filed January 6, 1950, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

Notice Is Hereby Given that George T. Goggin, as Receiver of the above-named debtor, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Denying Petition

for Review in Re Petition for Order Subordinating Claims of Bank of America entered by this court on January 6, 1950, in Judgment Book 63, at page 261, and from the whole thereof.

Dated: January 20, 1950.

/s/ MARTIN GENDEL,
Of Counsel, for George T. Goggin, Receiver and
Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed February 3, 1950, U.S.D.C.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION
OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

George T. Goggin, Receiver of the above-named debtor, through his counsel, hereby designates the entire record before the District Court, including all the papers, pleadings and evidence certified to the District Court by the Honorable Hugh L. Dickson, Referee in Bankruptcy, with his certificate on review from his Order on Petition of Receiver for Order Subordinating Claims of the Bank of America and on Supplemental petition thereto dated March 19, 1949, and all papers, pleadings and evidence filed with or received by the District Court in connection with said review.

Pursuant to the provisions of Rule 75(o) of the Rules of Civil Procedure for the United States District Courts, as amended, and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended, request is hereby made that the clerk of the above-entitled court transmit all the original papers in the file dealing with the action or the proceeding in which the appeal has been taken, including the Notice of Appeal and this designation.

Dated at Los Angeles, California, this 20th day of January, 1950.

/s/ MARTIN GENDEL,
Of Counsel, for George T. Goggin, Receiver and
Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed February 3, 1950.

In the District Court of the United States Southern District of California, Central Division

No. 45,207-B

In the Matter of:

SALSBURY MOTORS, INC.,

Debtor.

HEARING RE MOTION OF RECEIVER TO
RECONSIDER RULING ON MOTION OF
BANK OF AMERICA OBJECTING TO
THE JURISDICTION OF THE BANK-
RUPTCY COURT RE SUBORDINATION
HEARING

* * *

The Referee: I am not at all satisfied that my original order was in error. Therefore, this petition for rehearing will be denied.

(A short interruption.)

Mr. Gendel: I am sorry to bother the Court again and I appreciate your indulgence.

The Referee: What do you want? Let's get to the point.

Mr. Gendel: As I indicated in my argument, we prepared a proposed amended petition of the Receiver and I thought it might be fair if the Receiver was permitted to file the amended petition now and then have a review on the jurisdiction go up on the amended petition because we feel we have more completely set forth the facts.

The Referee: I passed on something that was before me when I made my ruling. Now, you want me to make the same ruling on the contents of a document about which I know nothing.

Mr. Gendel: We couldn't file it without the Court's permission. We would like permission to file it.

The Referee: If counsel has no objection, then I have none.

Mr. Steinmeyer: I have an objection, Your Honor. I think it should be noticed.

The Referee: I do, too.

Mr. Gendel: Your Honor is not ruling on the merits of the petition, but it would give the higher court the information we are arguing about. This amendment clearly sets forth the picture.

The Referee: I think it would be unfair to me and everybody else to pass on a document about which I know nothing.

Mr. Steinmeyer: That is right. I haven't seen it, either.

Mr. Gendel: Your Honor is ruling on the jurisdiction and we have enlarged on the specific facts which we think would sustain the subordination.

The Referee: I won't agree to your filing it unless counsel does.

Mr. Steinmeyer: I object because no notice has been given.

Mr. Gendel: May we have leave to serve and file the amended petition now and Your Honor can take the matter under submission?

The Referee: No. I have had things under sub-

mission all I want. You should have filed it a couple or three days before.

Mr. Gendel: We felt we couldn't file it without the permission of the Court with the other matter pending.

The Referee: That is true.

Mr. Gendel: We had no basis on which to file the amended petition unless Your Honor would hear it on the merits.

The Referee: I will deny your right to file the amended petition at this time.

* * *

[Endorsed]: Filed May 24, 1949, U.S.D.C.

Filed March 30, 1949.

HUGH L. DICKSON,
Referee.

[Title of District Court and Cause.]

HEARING IN RE OBJECTIONS TO
CLAIM OF BANK OF AMERICA

* * *

At this time we are not objecting to the allowance of any claims of the Bank of America. If that is not clear from our pleadings, it is only because they have not read those pleadings. What we are seeking to do by our subordination proceedings is to obtain from this Court an order subordinating any claims of the Bank of America as ulti-

mately allowed. It is true the Bankruptcy Act under its express provision gives the Court the right to re-inquire into any orders made on allowances of claims or objections thereto. We could proceed under that authority, but we are not. We are proceeding on the basis that whether the claims of the Bank of America amount to \$198,818.44, as it will amount to in the gross if the banker's lien litigation is affirmed, or if reversed it will be in some greater amount, but whatever amount is allowed ultimately that the payment of dividends on that allowed claim are subordinated.

* * *

The Referee: I understand that, but I am sustaining the motion to it on the ground I have no power to pass on a controversy between creditors. The plan says "All controversies with creditors." If the bank comes in here I have a right to pass on its claims, but as between creditors I don't think I have any right to do it.

Mr. Gendel: Would it be of any assistance for the record if we were to make an offer of proof or would the ruling of this Court at this time be limited purely to the jurisdictional problem involved in the objection of [63] the bank to the jurisdiction of the Court? I am concerned with whether or not Your Honor feels that the petitions themselves state facts sufficient to constitute a cause of action.

The Referee: I don't think so. I don't think they do, Mr. Gendel. I think they are lamentably lacking in specific allegations.

Mr. Gendel: At this time, Your Honor, in order to keep the record clear, if the Court is of the opinion that the petitions are at all lacking in specific allegations, we ask leave on behalf of the Reciever to amend the petition and the supplement with reference to the subordination of the Bank of America. This motion was presented only this morning.

The Referee: I don't know why you should not have leave to do that. How long do you want?

Mr. Steinmeyer: May I be heard on that point?

The Referee: Yes, sir. Don't you want to give them a chance? Give every man his chance, Mr. Steinmeyer.

Mr. Steinmeyer: I think that is right, Your Honor. I think the petition now, however, goes so much further than the evidence will show.

The Referee: I don't know about that, of course. My only idea was to give them an opportunity to get their petition in a form that would allege something. For instance, I remember one quotation where you said they "intimated" something.

Mr. Steinmeyer: I realize that, Your Honor, but if there is no jurisdiction for the court to hear it, then I see no purpose in it.

The Referee: I am inclined to think there is no jurisdiction here.

Mr. Steinmeyer: I am satisfied that is the case, Your Honor.

Mr. Gendel: My position is two-fold: If the Court is going to reserve its ruling purely on the point of jurisdiction, when we seek a review we

would limit our point to that, but if the Court would extend its ruling and find the facts alleged in the petition, pursuant to the motion made this morning, are not sufficient to constitute a cause of action then we would be in an embarrassing position. We would like leave to amend.

The Referee: I will limit my ruling then solely to the lack of jurisdiction.

Mr. Steinmeyer: There is one other point I would like to mention, the point I made this morning, that the Trustee has no power from the nature of his office to commence a proceeding of this kind.

The Referee: If that be so, then if he has no power to file it I would have no power to hear it. Isn't that right?

Mr. Steinmeyer: That is right. Shall I prepare the order on that?

The Referee: I would.

Mr. Gendel: I would appreciate that, Mr. Steinmeyer.

[Endorsed]: Filed March 24, 1949, U.S.D.C.

Filed: March 12, 1949.

HUGH L. DICKSON,
Referee.

[Title of District Court and Cause.]

HEARING RE OBJECTIONS TO PROPOSED
ORDER ON PETITION OF RECEIVER
FOR ORDER SUBORDINATING CLAIMS
OF BANK OF AMERICA AND ON SUP-
PLEMENT TO PETITION THERETO.

The following is a stenographic transcript of the proceedings had in the above entitled cause, which came on for hearing before the Honorable Hugh L. Dickson, Referee in Bankruptcy, at his courtroom, 343 Federal Building, Los Angeles, California, at 10:00 a.m., on Wednesday, April 6, 1949.

Appearances:

MARTIN GENDEL, ESQ.

Appearing on behalf of the Receiver.

ROBERT FABIAN, ESQ.,

Appearing on behalf of the Bank of
America.

The Referee: What have we this morning in Salsbury Motors, Inc.?

Mr. Gendel: If the Court please, as indicated by the documents filed on or about March 19, our matter this morning is limited to the question of the contents of the order on the petition of the Receiver for the order subordinating the claims of the Bank of America. Your Honor will recall that we had the oral arguments on it, I think first about March 2, and the reconsideration on March 18.

On that date there was submitted a form of order to be signed by Your Honor sustaining the objection to the jurisdiction. Our only problem this morning on behalf of the Receiver is, as we have pointed out in our objection—does Your Honor have the written objections?

(A short interruption while file is being searched.)

Mr. Gendel: There isn't anything I can add to what we have stated there. The response of the Bank of America contained objections generally to the allegations of fact, the petition for subordination, and the supplement thereto. Your Honor will remember we had a colloquy at the time the Court sustained the objections to jurisdiction and the Court indicated then the objection was sustained solely on the lack of jurisdiction. However, when the order was presented to Your Honor, it included all of the objections that the bank had urged.

The Referee: I have already signed the order.

Mr. Gendel: Our problem there is this. The order submitted to the Court was submitted on the 18th and signed by the Court, according to the records, on the 19th. Our objections in the form in which we have presented which are now before the Court apparently did not come to the Court's attention until the 21st. All we are trying to do now is present the form of the objections so that if Your Honor should see fit to agree with us on the order as we understand it, then I believe the Court could cure the problem by signing an amended order. I

suppose that would be the form. The only evil we are afraid of is this, Your Honor. The Court did make some comment during the time we were considering the petition and the supplement thereto on the reaction of the Court that the facts there were not stated too artfully and the language was perhaps too general and Your Honor felt that the allegations should be more specific. Now, if the Court's reaction along that line is right, we feel it is not a thing we want to stand on in adamant fashion and say those allegations are good and do not have to be changed. On the contrary, we have submitted to the Court a suggested amended petition which we think sets forth the basic allegations that the Receiver can prove, and if Your Honor is desirous of enlarging on the basis for your order on the objection to the jurisdiction of the Court, why, then the only relief we would like to have is the granting of permission to file that proposed amended petition.

We served a copy of that as well as attaching it to the objections so that there would not be any question as to allowing something to be filed which no one was familiar with. That has been served since about the 19th of March.

I respectfully urge that the order should be limited to the order made orally by this Court which was specifically only on the lack of jurisdiction. We do not think that the proper order as submitted by the bank should have been signed, but we did not have a chance to argue that to Your Honor because they brought it in the same day Your

Honor denied the motion to reconsider and we did not have five days under Rule 7a to consider that. We have submitted a form of order which we think is exactly in accordance with the colloquy between Your Honor and counsel.

The Referee: I don't think I should be bound by that one statement alone. In other words, I think I have a right to look at the whole picture regardless of what I may have said.

Mr. Gendel: We would not dispute that right because I believe it is common knowledge, or at least it is set forth in cases, that until the Judge signs his order it is not an order.

The Referee: That is correct.

Mr. Gendel: We do not dispute that right at all, but we say if you do want to enlarge on your order, then as a matter of equity, to give the Receiver his day in court, that you should permit us to file the amended petition so that the Appellate Court will be in a position to see our allegations as we think they should have been submitted in the first instance. The fear we have is that in the order which Your Honor signed there is the inclusion of the fact that the petition does not state facts sufficient to constitute a cause of action. We feel Your Honor's comments were well taken and we wanted then, if Your Honor was going to pass on the merits of the petition itself as to the allegations of fact, the opportunity to file an amended petition. That is all we are asking here. If Your Honor desires to enlarge on the order in accordance with the order of March 19, then we feel we ought to be allowed to file the

amended petition because Your Honor said something about every man having his day in court. We think the filing of the amended petition comes closer to handling our legal problems. We are not setting forth anything new. We are wording it more particularly so that if this Court or a higher court is ever required to pass on the merits as alleged, the whole picture will be there. That is all the relief we are asking for, either that it be limited to jurisdiction only or if not that we be allowed to file our amended petition.

The Referee: No. I will overrule that. I think I was right then. You may take it up on review.

Mr. Gendel: We ask for the right to file our amended petition.

The Referee: You can file anything you want. You can certify to a copy of the morning Times showing the election returns and we will take it, but I am not granting you permission to file it with the thought that I will pay any attention to it.

Mr. Gendel: That is our problem.

The Referee: Anybody can walk in here and file almost anything and they do many times. These objections will be overruled. You may file whatever you see fit.

Mr. Gendel: May we have leave then to file the original as part of our proposed objections? Is that agreeable to the Court?

The Referee: You can file any document you want, but it must be understood it was filed after I made my ruling.

Mr. Gendel: I think the objections reflect the fact we have not yet been given permission to file it.

The Referee: You may file it.

Mr. Gendel: Thank you, sir.

The Referee: And the original order will stand.

Filed: April 12, 1949.

HUGH L. DICKSON,
Referee.

[Endorsed]: Filed May 24, 1949, U.S.D.C.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ALLOWING CLAIM

The Receiver herein, George T. Goggin, heretofore filed in the above-entitled proceeding a "Petition for Order to Show Cause Against Bank of America Re: Jacques Power Saw Co." which Petition came on for hearing upon Order to Show Cause directed to Bank of America National Trust and Savings Association on December 2, 1947, at which time said Bank filed written objections to the jurisdiction of the Referee to make an order upon said Petition; and

Thereafter George T. Goggin, Receiver herein, filed "Objections to Claim of the Bank of America National Trust & Savings Association, and Prayer for Affirmative Relief" and the Claimant, Bank of America National Trust and Savings Association, filed its answer to said objections; and

The said objections to the claim came on for hearing before the Referee on January 12, 1948, the Receiver being represented by his attorneys Gendel & Chichester appearing by Martin Gendel, and the Claimant being represented by its attorneys Hugo A. Steinmeyer and John E. Walter; and

The Referee made and filed an Order Overruling Objections to Jurisdiction and consolidating Proceedings by which the "Petition for Order to Show Cause against Bank of America Re: Jacques Power Saw Co." filed herein by the Receiver on or about November 20, 1947, and "Objections to Claim of the Bank of America National Trust & Savings Association and Prayer for Affirmative Relief" filed herein by said Receiver on or about December 1, 1947, were consolidated for all purposes of hearing and decision; and

The parties having stipulated to the facts involved in said petitions by a stipulation in writing filed in said proceedings and the cause having been argued by respective counsel and submitted to the Referee and the Referee being fully advised in the premises having made and filed a "Memorandum Opinion on Claim of Bank of America";

Now, Therefore, the Referee does hereby make the following

Findings of Fact

I.

It is true, as alleged in paragraph II of the Receiver's objections, that Bank of America National

Trust and Savings Association, hereinafter referred to as the Claimant, did file a proof of claim in the within debtor proceedings entitled "In Proceedings Under Chapter XI, Section 322 of the Bankruptcy Act, Proof of Partially Secured Debt," which proof of claim disclosed that said Claimant held partial security for the said indebtedness set forth therein. It is not true that said claim is a contingent claim. The allegations of the second paragraph of paragraph II of the said objections of the Receiver are untrue. The allegations of the third paragraph of paragraph II are untrue.

II.

On or about February 18, 1946, Claimant loaned to the debtor in the above-entitled proceedings the sum of \$180,000 secured by a deed of trust upon the real property upon which the plant of the debtor was located. The said deed of trust provided by its terms that it should secure the repayment of said \$180,000 and any and all other indebtedness of the debtor to claimant whether then existing or thereafter created. Under date of February 18, 1946, Claimant entered into an agreement with said debtor by the terms of which Claimant agreed to extend credit to the debtor in the aggregate sum of \$500,000, to be repayable in annual installments on or before September 30, 1950. Thereafter on or about September 3, 1946, by an amendment to said agreement, Claimant agreed to increase the amount of credit to be extended to the debtor by an addi-

tional revolving credit of not to exceed \$450,000 until September 30, 1947. That thereafter Claimant loaned to said debtor the aggregate amount of \$600,000 pursuant to the terms of said credit agreement as amended.

III.

That continuously from the date of said agreement the debtor regularly maintained its deposit accounts with Claimant as a bank of deposit. That continuously from the date of said agreement the debtor deposited with Claimant for collection and credit to the debtor's commercial deposit account notes and drafts accompanied by order bills of lading evidencing sales of merchandise by the debtor and in the regular course of business said drafts were collected and the proceeds credited to said commercial account. That during the period from June, 1946, until December, 1946, the amount of collection items deposited with Claimant averaged from \$40,000 to \$50,000 per month, and during the year 1947 up to August 20, 1947, the collection items so deposited with Claimant averaged approximately \$150,000 per month.

IV.

On August 19, 1947, the debtor was in default in the payment of its indebtedness to Claimant; on said date Claimant offset from the various deposit accounts with the debtor the balances thereof in the aggregate amount of \$161,125.55. After the offset of said balances there was due and unpaid on account of the indebtedness of debtor to Claimant

the principal sum of \$601,482.80 and interest on the sum of \$159,300 from August 13 to August 19, 1947, inclusive, in the sum of \$139.39.

On August 20, 1947, the date of filing the Petition in the above-entitled proceeding, Claimant held in its hands notes or drafts drawn upon drawee purchasers in the amounts set opposite their respective names as described and set forth in pages 1 and 2 of Exhibit "A" to the Objections to Claim filed by the Receiver herein, and likewise held in its hands in each of said transactions order bills of lading representing the right to receive the merchandise described therein which was in course of shipment to the various drawee purchasers.

V.

Subsequent to August 20, 1947, Claimant collected all of said notes and drafts and delivered the merchandise evidenced by the bills of lading to the drawee purchasers with the exception of the specific transactions hereinafter set forth:

(a) Subsequent to August 20, 1947, Hellgate Motors, Missoula, Montana, rejected payment of the draft for \$1,206.40 described in Exhibit "A"; Claimant caused the said merchandise to be diverted to another purchaser who paid the said draft and accepted said merchandise, and Claimant received a net amount of \$1,123.86 after deduction of additional freight charges;

(b) The Alton Automotive Sales & Service, Alton, Illinois, rejected payment of one draft for \$17,645.85 and Claimant caused said merchandise

to be diverted to another purchaser and received a net amount of \$16,995.95 after deducting additional freight charges thereon;

(c) Each of the following drawee-purchasers rejected drafts drawn upon them, to wit:

Drawee-Purchaser	Amount
Motor Scooter Dist. Co., Omaha, Nebraska	\$ 904.80
W. W. Warsaw, Waterloo, Iowa	17,646.00
Neil K. Hoak, Huron, Ohio	1,508.00
Beecroft & Lund, West Palm Beach, Florida.....	603.20
Beecroft & Lund, West Palm Beach, Florida.....	603.20
Paszamount Distr. Co., New Brunswick, New Jersey.....	4,222.40
Neil K. Hoak, Huron, Ohio	1,508.00
Harley-Davidson Sales, Gadsen, Alabama	1,508.00
Alton Automotive Sales & Service, Alton, Illinois	17,645.85
	<hr/>
	\$46,149.45

Thereafter Claimant caused the merchandise forwarded with said drafts consisting of 153 scooters to be returned to Pomona, California, and temporarily stored in the plant of the debtor under

the terms of an agreement in writing designated "Agreement and Order Concerning Possession and Sale of Motor Scooters" entered into between George T. Goggin, Receiver of Salsbury Motors, Inc., Debtor, and Claimant under date of September 22, 1947, and confirmed and approved by an order of the Honorable Hugh L. Dickson, Referee in the above-entitled proceedings, on September 23, 1947.

Claimant incurred liability for and paid freight and demurrage charges in the aggregate amount of \$4,931.47 in causing the said 153 motor scooters to be returned to the plant of the debtor at Pomona, California. Thereafter Claimant employed the debtor through the Receiver herein to perform work and services upon said motor scooters and paid to the Receiver the sum of \$1,461.86, representing the cost thereof. On or about October 16, 1947, Claimant was informed by the Receiver that sales of motor scooters had dropped off rapidly. In the latter part of November, 1947, the Receiver had not sold all of the motor scooters then on hand and was unable to find a purchaser for the 153 motor scooters held by Claimant. In the latter part of November Claimant endeavored to secure a purchaser for said 153 motor scooters and on December 2, 1947, sold the said 153 motor scooters for the sum of \$34,425, which was the best and only price Claimant was able to secure upon the sale thereof.

(d) The Motorette Corp., Buffalo, New York, rejected two drafts for \$4,775.00 each, each of which

was accompanied by bills of lading entitling the holder to 50 engines; that Claimant caused the said engines to be stored in Buffalo, New York, pending a possible sale thereof. Claimant has incurred and paid insurance and warehouse charges in the sum of \$82.01 on said engines, and further charges are accruing. At the date of hearing no purchaser for the said engines had been found.

VI.

Claimant has received \$150,510.71 as the proceeds of collection items having a face amount of \$169,400.93 and said \$150,510.71 constitutes a reduction of Claimant's claim against the estate of the debtor.

VII.

Included among the said collection items listed and described in Exhibit "A" to said Objections was a promissory note executed by the Jacques Power Saw Company of Denison, Texas, payable to the debtor in the principal amount of \$35,837 on July 16, 1947. The said promissory note was deposited by the debtor with the Claimant on or about July 8, 1947, for collection and credit to the commercial deposit account of the debtor and was transmitted to the correspondent of Claimant in Denison, Texas. Payment of said note was refused and it was returned to Claimant on or about July 31, 1947. On or about August 1, 1947, Claimant informed the debtor that said note had been returned and debtor instructed Claimant to re-submit the said note for collection.

On or about June 30, 1947, the debtor had issued on its books but had not completed carrying forward a credit memorandum of \$1,163.50 to said Jacques Power Saw Company to cover undelivered items which had originally been included in the amount of the note.

On August 21, 1947, the debtor delivered to Claimant a letter in words and figures as follows:

August 21, 1947

“Bank of America
National Trust and Savings Association
Pomona, California

Attn.: Mr. Farrand

Gentlemen:

On July 8, 1947, we deposited with you for collection a promissory note on which Jacques Power Saw Company of Denison, Texas, was the payor and Salsbury Motors, Inc., was the payee. The note was due July 16, 1947, and was in the principal amount of \$35,837.00.

Please be advised that your authority to collect said note is hereby terminated, effective immediately. Collection will be effected by direct dealings between ourselves and Jacques Power Saw Co.

Very truly yours,

SALSBURY MOTORS, INC.,

/s/ G. R. CASE,

General Manager.”

On or about August 22, 1947, the debtor agreed with the maker of the note that the credit memorandum of \$1,163.50 was a proper credit upon the note. On or about August 25, 1947, the maker of the note paid the net amount of \$34,653.50 to claimant's correspondent bank in Denison, Texas, upon surrender of the note and said funds were received by Claimant on or about August 27, 1947. Said sum of \$34,653.50 is part of the aggregate sum of \$150,510.71 received by Claimant as specified in paragraph VI of these findings.

VIII.

None of the notes and drafts or bills of lading accompanying the same deposited by the debtor with Claimant as collection items during the course of the operation of the business of the debtor from the time of the loan agreement on February 18, 1946, to the date of filing the petition in the above-entitled proceedings was at any time pledged by the debtor to secure any indebtedness of the debtor to Claimant. No immediate credit was given by Claimant to the deposit accounts of the debtor upon the deposit of any of said collection items but all of said items were deposited with Claimant for collection and credit of the proceeds of the collection to the deposit account of the debtor when said collections were completed. During the period from February 18, 1946, to August 19, 1947, Claimant did, in the usual course of business, credit to the deposit account of the debtor, as and when received, the proceeds of all collection items in accordance

with the instructions of the debtor. In each of the collection items in the hands of Claimant on August 20, 1947, the debtor had issued and Claimant had accepted instructions to credit the proceeds of said collections when received to the commercial deposit account of the debtor.

IX.

On or about September 8, 1947, Claimant duly filed its proof of claim against the estate of the above-named debtor for the principal sum of \$601,-482.80, together with interest therein as set forth.

Claimant has refused to turn over to the Receiver any of the notes, drafts or collection items hereinbefore referred to or the proceeds thereof.

X.

To the extent that they may be inconsistent with the foregoing facts, the allegations of paragraphs IV, V, VI and VII of the Receiver's objections to claim are untrue.

XI.

The allegations of paragraphs IV, VI and VII of Claimant's answer to objections to claim are true.

XII.

The allegations of paragraph I of the separate defense of Claimant to the said objections are true.

And from the foregoing Findings of Fact, the Referee makes the following

Conclusions of Law

I.

The Claimant is entitled to hold the said collection items that were in the hands of Claimant at the date of filing the Petition in the above-entitled proceedings under its claim of a general banker's lien and to hold the proceeds of such collections or the sale of the property represented thereby and apply the same upon the indebtedness of debtor to Claimant.

II.

The Receiver is not entitled to the possession of the collection items in the hands of the Claimant at the time of filing the Petition in the above-entitled proceedings and is not entitled to any of the proceeds of said collections.

III.

The receiver's objections to claim of Claimant should be overruled and said claim allowed for the principal sum of \$601,482.80, plus interest in the sum of \$139.39 as set forth in said claim, from which shall be deducted the sum of \$150,510.71 received by Claimant upon collection items in the hands of Claimant on August 20, 1947, and subject to the requirements that there shall be applied upon the balance of said indebtedness the net proceeds of the sale of the real property securing said indebtedness and the net amounts received by Claim-

ant upon the collection items described in Finding V(d) or the sale of the motors referred to therein.

IV.

Claimant is entitled to participate as an unsecured creditor in all dividends paid upon unsecured claims for the balance of its claim as so determined.

Now, Therefore, from the foregoing Findings of Fact and Conclusions of Law, the Referee makes the following

Order

It Is Hereby Ordered that the Receiver's "Petition for Order to Show Cause Against Bank of America Re: Jacques Power Saw Co." be and it hereby is denied; and

It Is Further Hereby Ordered that the objections of the Receiver to the claim of Bank of America National Trust and Savings Association heretofore filed herein be and the same are hereby overruled and the prayer for affirmative relief of said Receiver be and it is hereby denied; and

It Is Further Hereby Ordered that the claim of Bank of America National Trust and Savings Association filed herein is hereby allowed in the sum of \$601,482.80 principal, and interest in the sum of \$139.39, from which there shall be deducted the sum \$150,510.71 heretofore received by said Claimant from the proceeds of collection items in its possession at the date of filing the Petition in the above-entitled proceedings, and subject to the

requirement that the net proceeds of the sale of the real property securing said indebtedness and the net proceeds of the remaining uncollected collection items in the possession of said Claimant shall be applied in reduction of the balance of said claim; and

It Is Further Ordered that said Claimant shall be entitled to dividends upon the said claim at the same rate paid to unsecured creditors when the remainder of the security held by said Claimant has been liquidated and the proceeds applied upon the unpaid balance of said claim.

Done in open court this 22nd day of March, 1948.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed Mar. 16, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 336, inclusive, contain full, true and correct copies of Petition of Debtor in Proceedings for an Arrangement; Statement of Affairs and Schedules A and B; and Approval of Debtor's Petition and Order of Reference and the original Referee's Certificate on Review; Notice of Motion

for Leave to File Petition for Intervention and Answer to Objections by Receiver to Claim of Northrop Aircraft, Inc.; Petition for Intervention and Answer to Objections by Receiver to Claim of Northrop Aircraft, Inc.; Debtor's Proposed Second Amended Plan of Arrangement; Order Confirming Debtor's Second Amended Plan of Arrangement Under Chapter XI of Bankruptcy Act; Consent by Creditor to Second Amended Plan of Arrangement; Petition of Receiver for Order Subordinating Claims of Bank of America; Supplement to Petition of Receiver for Order Subordinating Claims of Bank of America; Order to Show Cause re Bank of America; Agreement of Indemnity of Northrop Aircraft, Inc., and Order of Court Approving Same; Release and Satisfaction of Indemnity Agreement; Response to Order to Show Cause re Petition of Receiver for Order Subordinating Claims of Bank of America, etc.; Notice of Motion of Receiver to Reconsider Ruling on Motion of Bank of America Objecting to the Jurisdiction of the Bankruptcy Court re: Subordination Hearing; Points and Authorities in Support of Motion of Receiver to Reconsider Ruling of Referee on the Jurisdiction Point Involving the Subordination of Bank of America; Order on Petition of Receiver for Order Subordinating Claims of Bank of America and on Supplemental Petition Thereto; Objections of Receiver to Proposed Order on Petition of Receiver for Order Subordinating Claims of Bank of America and on Supplement to Petition Thereto;

Amended Petition of Receiver for an Order Subordinating Claims of Bank of America; Two Orders Extending Time to File Petition for Review; Petition for Review of Order of Referee Dated March 19, 1949, on Petition of Receiver for Order Subordinating Payment of Dividend on Claims of Bank of America; Proof of Claim of Northrop Aircraft, Inc.; Objections by Receiver to Claims of Northrop Aircraft, Inc., and Prayer for Affirmative Relief; Answer of Receiver to Motion of Bank of America for Leave to File Petition for Intervention and Answer to Objections; and Motion to Dismiss the Same; Order Granting Motion of Bank of America, etc., for Leave to File Petition for Intervention and Answer to Objections by Receiver to Claim of Northrop Aircraft, Inc.; Stipulation and Order; Proof of Claim of Bank of America, etc.; Points and Authorities in Support of Petition for Review of Order of Referee Dated March 19, 1949; re: Subordination of Payment of Dividends on Claims of Bank of America; Reply Memorandum of Authorities to Receiver's Petition to Review Order of March 19, 1949; Objections of Petitioner on Review to Proposed Order Denying Petition for Review in re Petition for Order Subordinating Claims of Bank of America; Order Denying Petition for Review in re Petition for Order Subordinating Claims of Bank of America; Notice of Appeal and Designation of of Record on Appeal which, together with Reporter's Transcripts of Proceedings on March 2, March 18 and April 6, 1949, transmitted herewith,

constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$10.50 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 10th day of March, A.D 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12498. United States Court of Appeals for the Ninth Circuit. George T. Goggin, as Receiver of the Estate of Salsbury Motors, Inc., Debtor, Appellant, vs. Bank of America National Trust and Savings Association, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 11, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Appellant, George T. Goggin, Receiver of Salisbury Motors, Inc., a corporation, debtor, intends to rely on appeal on the following points:

1. The District Court and the Referee erred in holding that the Bankruptcy Court had no jurisdiction to grant the relief sought by the appellant in the Receiver's Petition, the Supplement thereto, and the Amended Petition to Subordinate the Claim of the Bank of America.

2. The District Court and the Referee erred in holding that the Receiver did not have the power or authority to file the aforesaid Petitions for Subordination of the Claim of the Bank of America.

3. The District Court and the Referee erred in holding that the aforesaid Petition, the Supplement thereto, and the Amended Petition failed to state claims upon which the relief therein requested could be granted.

4. The District Court and the Referee erred and abused their discretion in refusing to grant the Receiver leave to amend his pleadings after apparently holding that the original pleadings did not state facts sufficient to constitute a cause of action.

5. The District Court and the Referee erred and abused their discretion in overruling the ob-

jections of the Receiver to the proposed forms of order on the Receiver's Petition and the Referee erred in signing said proposed order without considering the objections of the Receiver thereto.

Dated this 10th day of March, 1950.

GENDEL & RASKOFF.

By /s/ H. MILES RASKOFF,
Of Counsel for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed Mar. 11, 1950.

United States Court of Appeals
For the Ninth Circuit

No. 12498

GEORGE T. GOGGIN, Receiver of Salsbury
Motors, Inc., a Corporation, Debtor,
Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION, a National Bank-
ing Association,

Appellee.

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED

Appellant, George T. Goggin, Receiver of Salsbury Motors, Inc., a corporation, debtor, does here-

by designate the following portions of the record, proceedings and evidence certified to the Clerk of this Court by the Clerk of the District Court in connection with the within appeal, as material to the consideration of the appeal. (The page numbers following each item hereinafter designated, refer to the page of the record certified to this Court by the Clerk of the District Court at which the document can be found:)

1. Petition of Debtor in proceedings for an arrangement, without the exhibits thereto. Page 2.

2. Statement of Affairs (being Exhibit 2 to the Petition of Debtor). Page 9.

3. Summary Sheet of Schedules A and B. Page 16.

4. Approval of Debtor's Petition and Order of Reference under Section 322 of the Bankruptcy Act. Page 35.

5. Referee's Certificate of Review. Page 36.

6. Debtor's Proposed Second Amended Plan of Arrangement. Page 88.

7. Order of Referee confirming Debtor's Second Amended Plan of Arrangement. Page 97.

8. Consent by Creditor to Second Amended Plan of Arrangement. Page 102.

9. Petition of Receiver for Order Subordinating Claims of Bank of America. Page 104.

10. Supplement to Petition of Receiver for Order Subordinating Claims of Bank of America. Page 109.

11. Order to Show Cause re Bank of America. Page 113.

12. Agreement of Indemnity of Northrop Aircraft, Inc., and Order of Court Approving same. Page 114.

13. Release and Satisfaction of Indemnity Agreement. Page 122.

14. Response to Order to Show Cause. Page 125.

15. Notice of Motion of Receiver to Reconsider Ruling on Motion of Bank of America. Page 128.

16. Order of Referee on Petition for Order Subordinating Claims. Page 150.

17. Objections of Receiver to proposed Order Subordinating Claims, etc. Page 153.

18. Amended Petition of Receiver for Order Subordinating Claims of Bank of America. Page 174.

19. Petition for Review of Order, etc. Page 189.

20. Proof of Claim of Bank of America. Page 246.

21. Objections of Receiver to proposed Order Subordinating Claims, etc. Page 325.

22. Order of Judge Denying Petition for Review, etc. Page 329.

23. Notice of Appeal. Page 332.

24. Designation of Record on Appeal. Page 334.

The following portions of the Transcripts of Hearings:

A. Transcript of hearing re Objections to Claim of Bank of America before Referee in Bankruptcy of March 2, 1949, beginning at Line 17, Page 63 of

said transcript and ending at Line 3, Page 66 of said transcript.

B. Transcript of hearing re Motion of Receiver to Reconsider ruling on Motion of Bank of America objecting to the jurisdiction of the Bankruptcy Court before the Referee in Bankruptcy on March 18, 1949, commencing at Line 2, Page 30 thereof, and ending at Line 4, Page 32 of said transcript.

C. Transcript of hearing re Objections to Proposed Order on Petition of Receiver for Order Subordinating Claims of Bank of America before the Referee in Bankruptcy on April 6, 1949, in its entirety, consisting of the full seven pages of said transcript.

In addition to the foregoing portions of the record on appeal, Appellant designates for printing this Designation of Record and the Statement of Points upon which Appellant intends to rely, filed with this Court simultaneously herewith.

Appellant hereby requests that all of the aforementioned portion of the records, proceedings and evidence before the District Court and this Court, be printed.

Dated this 10th day of March, 1950.

GENDEL & RASKOFF,
By /s/ H. MILES RASKOFF,
Of Counsel for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed Mar. 11, 1950.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD
TO BE PRINTED

Appellee Bank of America National Trust and Savings Association does hereby designate the following portions of the record, proceedings, and evidence certified to the Clerk of this Court by the Clerk of the District Court in connection with the within appeal as material to the consideration of the appeal:

1. That portion of statement of counsel for Appellant contained in transcript of hearing re objections to claim of Bank of America before Referee in Bankruptcy on March 2, 1949, beginning at Line 13, Page 31 of said transcript and ending at Line 3, Page 32 of said transcript.

2. Findings of Fact, Conclusions of Law and Order allowing claim dated March 22, 1948, being a part of the record on appeal in this Court in Case No. 12206, George T. Goggin, Receiver of the Estate of Salsbury Motors, Inc., Appellant, v. Bank of America National Trust and Savings Association, Appellee, being printed at Pages 80 to 92, inclusive, of the printed transcript of record in said Case No. 12206.

Appellee designates and requests the Honorable Clerk of this Court to reprint as a part of the record on appeal in Case No. 12498 the aforesaid Findings of Fact, Conclusions of Law and Order

allowing claim printed in the record of Case No. 12206 at Pages 80 to 92, inclusive.

Appellee further designates for printing this designation of record.

Appellee hereby requests that all of the aforesaid portions of the records, proceedings, and evidence before the District Court and this Court, in addition to the portions designated by the Appellant, be printed.

Dated this 30th day of March, 1950.

HUGO A. STEINMEYER and
ROBERT H. FABIAN,

By /s/ ROBERT H. FABIAN,
Attorneys for Appellee.

Affidavit of service by mail attached.

[Endorsed]: Filed Mar. 31, 1950.

No. 12498.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, as receiver of the Estate of SALSBUURY
MOTORS, INC., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSO-
CIATION,

Appellee.

APPELLANT'S OPENING BRIEF.

GENDEL & RASKOFF,

810 James Oviatt Building, Los Angeles 14

Attorneys for Appellant.

FILED

JUN 27 1950

PAUL P. O'BRIEN

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Remington on Bankruptcy, Vol. 6, Sec. 2875, p. 477....	App. p. 2
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No. 12498.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, as receiver of the Estate of SALSBUURY
MOTORS, INC., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSO-
CIATION,

Appellee.

APPELLANT'S OPENING BRIEF.

*To the Honorable Judges of the United States Court of
Appeals, for the Ninth Circuit:*

This appeal is from a final order of the District Court for the Southern District of California, Central Division, the Honorable Harry C. Westover, Judge presiding [Tr. 150-152]. The order was made in a proceeding under Chapter XI of the Bankruptcy Act and was an affirmation of the order of the Referee in Bankruptcy and a denial of the appellant's petition for review thereof. The said order constituted a ruling that the petition of appellant-receiver to subordinate the claims of the Bank of America presented controversies and issues beyond the jurisdiction of the Bankruptcy Court and that the appellant had failed to state a claim upon which any relief could be granted.

Jurisdictional Statement.

As a court of bankruptcy, the United States District Court had jurisdiction of this cause pursuant to the Act of July 1, 1898, as amended.¹ On August 20, 1947, the debtor (hereinafter referred to as "Salsbury") filed a petition under Chapter XI of the Bankruptcy Act and thereby commenced this bankruptcy proceeding [Tr. 2-18]. On the same day, the petition was approved by the Honorable Leon R. Yankwich, Judge of the United States District Court, and the matter was referred to Hugh L. Dickson, referee of said court [Tr. 19]. On September 9, 1947, appellee, Bank of America National Trust & Savings Association (hereinafter referred to as "Bank" or "Bank of America") filed a proof of partially secured debt [Tr. 124-147].² On July 30, 1948, the appellant-receiver filed a petition for order subordinating claims of Bank of America [Tr. 58] with a supplement thereto being filed by the receiver on January 21, 1949 [Tr. 63]. On July 30, 1948, the referee in bankruptcy issued an order to show cause on the receiver's petition, directing the Bank to appear and show cause why the relief requested in the petition should not be granted [Tr. 67]. At the hearing on the order to show cause, the Bank filed its

¹Chapter 541, Sections 1 and 2, 30 Stat. 544, 545, as amended; United States Code, Title XI, Chapter 1, Section 1, Chapter 2, Section 11.

²The filing date shown on page 147 of the printed transcript of record herein is in error; the correct date is September 9, 1947.

response to the receiver's petition [Tr. 79] objecting to the jurisdiction of the Bankruptcy Court and to the sufficiency of the petition and the supplement thereto as stating a claim upon which relief could be granted. By order dated March 19, 1949, the Referee dismissed the order to show cause and denied the petition on the ground that the Bankruptcy Court was without jurisdiction to hear and determine the matter [Tr. 83]. A petition to review said order was duly filed by the receiver [Tr. 107], and by order dated January 6, 1950, and entered January 20, 1950, the Honorable Harry C. Westover denied the appellant's petition for review [Tr. 150]. Within the time allowed by law, appellant filed a notice of appeal [Tr. 152] and said appeal has been perfected by taking all the steps required by law.

The jurisdiction of the Court of Appeals is invoked pursuant to Sections 24 and 25 of the Bankruptcy Act.³ Appellate jurisdiction over this proceeding in bankruptcy vested in the Court of Appeals upon the receiver's filing his notice of appeal on February 3, 1950; the amount involved is in excess of \$500.00.

³Act of July 1, 1898, as amended, Chapter 541, Sections 24 and 25; 30 Stat. 533, as amended; United States Code, Title XI, Chapter 4, Sections 47 and 48.

Statement of the Case.

Introductory Statement.

Prior to the confirmation of the plan of arrangement hereinafter mentioned, the Bank of America filed a claim in the Chapter XI proceedings against the debtor in an amount in excess of six hundred thousand dollars, of which the Bank alleged that approximately three hundred eighty thousand dollars was secured, leaving a claimed balance unsecured in the sum of approximately one hundred and twenty-six thousand dollars [Tr. 124-147]. After the said claim was filed, and prior to confirmation of the plan of arrangement, the receiver filed objections to the claim with a prayer for affirmative relief on the ground that the Bank had wrongfully seized certain commercial paper belonging to the debtor under an alleged claim of banker's lien. The Referee overruled the said objection to the claim, and the Referee's ruling was affirmed by the District Court on review; that controversy is now pending before this Honorable Court.⁴

The instant proceedings, which are involved in this appeal, are separate and distinct from the aforesaid objections to the claim. These proceedings were commenced with the receiver's petition and supplement thereto [Tr. 58-66] alleging in substance that the Bank had knowingly given false and misleading information to the existing unpaid creditors of the debtor herein pertaining to the

⁴*Goggin v. Bank of America National Trust & Savings Association* (United States Court of Appeals for the Ninth Circuit No. 12206).

Opinion affirming order appealed from filed February 23, 1950; petition for rehearing filed March 24, 1950; rehearing granted April 18, 1950, and cause now stands submitted.

financial condition of the debtor, intending the reliance thereon by creditors, and that on the basis of this misinformation those persons who are now the unpaid creditors of the debtor extended credit to the debtor, which credit would not have been extended had the Bank given a true statement of the facts it then knew relating to the debtor's position. By reason of these facts, the receiver alleged that it would be unfair and inequitable to permit the Bank to participate in the distribution of dividends on a parity with those persons who had relied upon, and had been misled by the misinformation given them by the Bank.

A separate aspect of the subordination petition and supplement thereto pertains to the sum of \$75,000.00 paid to the receiver by Northrop Aircraft, Inc., a corporation, which was the parent owning all of the capital stock of the debtor in this proceeding. Northrop Aircraft, Inc., had filed a claim against the debtor for a sum in excess of one million dollars, and the receiver had filed objections thereto with a prayer for affirmative relief on the ground that Northrop was the *alter ego* of the debtor and was therefore liable for all of the debtor's indebtedness. The controversy between Northrop Aircraft, Inc., and the receiver was compromised and settled in consideration of Northrop's paying to the estate the sum of \$75,000.00 and agreeing to subordinate its entire claim against the debtor to the claims of all of the other creditors. The payment of said \$75,000.00 to the receiver was expressly agreed to be based upon the *alter ego* contentions of the receiver against Northrop Aircraft, Inc. [Tr. 49-52]. In the receiver's petition in the instant case, he alleged that the \$75,000.00 payment in compromise of his *alter ego* contentions against Northrop Aircraft, Inc., could not

equitably be the basis for the payment of any dividends to the Bank because the Bank, in extending credit to the debtor herein, was the only one of all the unpaid creditors that had been specifically informed by Northrop that Northrop would not be responsible for the obligations of the debtor, and that by reason of this fact the Bank had insisted that Northrop agree to subordinate payment of all of its claims against the debtor until the claim of the Bank was paid. On the basis of these allegations, the receiver, in addition to praying for the subordination of the entire claim of the Bank of America as hereinabove described, concluded with a prayer that if the Court did not grant the complete subordination prayed for, the Bank of America should not, for the reasons stated, participate in any dividends from the \$75,000.00 paid into the estate by Northrop Aircraft, Inc.

On the day of the hearing of the receiver's petition and supplement thereto (almost 8 months after the original order to show cause was issued), the Bank served and filed a document entitled "Response to Order to Show Cause re Petition of Receiver for Order Subordinating Claims of Bank of America National Trust & Savings Association" [Tr. 79]. Although four separate grounds of objection were asserted in the said response, the substance thereof was that the Court had no jurisdiction to entertain the receiver's petition, and that, in any event, the receiver's petition failed to state facts entitling him to any relief. The Referee orally indicated that his ruling in favor of the Bank would be limited to the ground

that the Court had no jurisdiction because he construed the order confirming the plan of arrangement as reserving no such jurisdiction [Tr. 160]. The formal written order [Tr. 83], despite the receiver's objections thereto [Tr. 86], provided that all of the objections set forth in the aforesaid response of the Bank were well founded. A similar type of order was entered by the District Judge on review from the Referee's order [Tr. 115, 148]. It is significant to note that the debtor's proposed second amended plan of arrangement [Tr. 39], which was subsequently confirmed by the Court, was filed with the Court on July 8, 1948, and the order confirming the plan of arrangement [Tr. 40-44] was entered July 30, 1948, the same day on which the original petition of the receiver for an order subordinating the claims of the Bank of America was filed [Tr. 58-62].

Our basic contentions are:

1. The Bankruptcy Court had jurisdiction to hear and determine the matters set forth in the receiver's petition and supplement thereto and his amended petition.
2. The receiver's petition and supplement thereto stated a claim upon which relief could be granted.
3. There was an abuse of the discretion of the Referee and District Judge in their failure to consider the receiver's amended petition, which stated a cause of action.

Detailed Statement.

The summary of debts and assets filed by the debtor herein [Tr. 16-18] showed a total indebtedness of \$2,-724,881.00, and total assets of \$2,162,957.17. Included within the scheduled obligations of the debtor was an obligation of an amount in excess of \$1,345,000.00 allegedly owing to Northrop Aircraft, Inc., which corporation was the parent of the debtor, its wholly owned subsidiary [Tr. 49]. By operation of a compromise between Northrop Aircraft, Inc., and the receiver, Northrop's claim was subordinated to the claims of all other creditors [Tr. 50-51]. The Bank asserted a claim against the debtor alleging that as of the date of the commencement of the bankruptcy proceedings the debtor was indebted to the Bank in a sum slightly in excess of \$601,000.00; the Bank further set forth in its proof of claim that it held, under an asserted banker's lien, approximately \$175,000.00 worth of notes, drafts and merchandise, the proceeds of which would be credited against the indebtedness when received. The proof of claim of the Bank asserted that a portion of the indebtedness was secured by a deed of trust that had originally been given to secure a promissory note of the debtor in the principal amount of \$180,000.00, but which deed of trust contained a provision that it was to be security for any and all other indebtedness and obligations of the debtor to the Bank, whether present or future [Tr. 124-148]. In its proof of claim the Bank estimated the value of the security to be \$300,000.00.

It will thus be seen that, after eliminating the alleged indebtedness to the parent corporation, the total indebted-

ness to the Bank constituted approximately 50% of the total indebtedness of the debtor.

The debtor's proposed second amended plan of arrangement was filed with the Referee in Bankruptcy on July 7, 1948 [Tr. 29-39], and was confirmed by an order of the Referee on July 30, 1948 [Tr. 40-57]. The second amended plan of arrangement, prior to its confirmation by the Court, was submitted to the debtor's creditors, who duly filed their written consents thereto. One of these consents is included in the record on appeal [Tr. 56]. The consent recited that the "undersigned has received a copy of the debtor's second amended plan of arrangement and does hereby consent to . . . the provisions and terms thereof, and agrees that the above entitled court may enter an order confirming the same." The consent closed with the following proviso:

"This consent to the second amended plan of arrangement, except in respect to the release of the debtor and Northrop Aircraft, Inc., and the approval and confirmation by the court, shall not in any manner prejudice the rights, defenses or cause of action that the undersigned, as a creditor, would have, or that George T. Goggin, as receiver, now has, or that George T. Goggin, as trustee in bankruptcy, would have, or any creditor of Salsbury Motors, Inc., would have, in the event that Salsbury Motors, Inc., were adjudged a bankrupt and George T. Goggin were duly appointed trustee in bankruptcy, but that the rights of the undersigned and all parties shall be the same as if Salsbury Motors, Inc., were so adjudged a bankrupt and George T. Goggin were appointed trustee." [Tr. 57.]

Thus the consents of the creditors were based upon the provisions of the plan, and, therefore, in connection with the issue here presented as to the reservation of jurisdiction by the Bankruptcy Court, it is necessary to look at the plan itself [Tr. 45-56]. Article I of the plan [Tr. 45] provides that the creditors of the debtor be divided into four classes, the first class being those debts which were expenses of administration incurred in the Chapter XI proceedings; the second class covered the debits entitled to priority under the Bankruptcy Act; the third class was composed of all creditors holding securities or liens; and the fourth class was "all other creditors" who, it was provided, were to be paid:

" . . . a pro rata dividend in the same manner and with like effect as if an order of adjudication were entered herein, and the trustee in bankruptcy was paying a partial or final dividend, said payments to be made at such time and in such amounts as the court may from time to time upon the petition of any party in interest, order, and the court to reserve jurisdiction to determine the amount and validity of all claims and the classification of said claims and all objections that may be made in respect thereto with like effect and power as if the above-named debtor had been adjudicated a bankrupt, and George T. Goggin was the acting trustee in bankruptcy. That said George T. Goggin, as receiver and disbursing agent, shall have the right to object to any and all claims with like effect as if he were acting in the capacity of trustee in bankruptcy." [Tr. 46.]

Article IV of the plan sets forth the authorization and powers and duties of the receiver, and the reserved jurisdiction of the Court in the following all-inclusive language:

“That there remain vested in George T. Goggin as receiver and disbursing agent, all causes of action, exclusive of the matters settled and compromised as set forth in Article V herein, that could or would vest in George T. Goggin as trustee in bankruptcy in the event an order of adjudication were entered in the above-entitled proceeding, with full right and power to prosecute any and all causes of action, objections to claims, with full right to assert all offsets, counterclaims and affirmative claims, and any and all other rights that are now vested in him as receiver herein or that would vest in him as a trustee in bankruptcy in the event of the entry of an order adjudging the above-named debtor to be a bankrupt under the Acts of Congress relating to bankruptcy, and the appointment of George T. Goggin as trustee in bankruptcy. There shall remain vested in the creditors, such rights of actions and claims as they may have at this time against parties other than the debtor, exclusive of the matters settled and compromised in Article V herein, without limiting any of the foregoing provisions contained in this Article, the order confirming the second amended plan of arrangement and the acceptance by creditors of the same, shall be without prejudice as to the rights of creditors, receiver, his successor in interest, or the bankrupt estate, in connection with any and all proceedings or claims existing or now pending or that may be instituted against any person or corporation, except the rights, claims and demands settled and compromised under Article V herein.” [Tr. 48-49.]

Article V of the plan sets forth the complete disposition with respect to the claim of Northrop Aircraft, Inc. There is an express recognition in that article of the position which was to be taken by the receiver with respect to subordination of the claim of the Bank of America. In the portion of that article whereby Northrop Aircraft, Inc., agreed to indemnify the receiver in the approximate sum of \$90,000.00 against any liability to the Bank of America by reason of the Bank's assertion of rights to receive dividends on Northrop's claim, it is expressly stated:

“ . . . The indemnity liability of Northrop shall not be increased by reason of any increase in the claim of the Bank of America as above set forth, or by reason of any subordination of such claim of the Bank of America, in whole or in part, to the claims of other general creditors with respect to the funds in the hands of George T. Goggin, as receiver, or any part thereof, or as a result of any other litigation, controversy or settlement between said George T. Goggin and said Bank of America, which affect the status or the amount of said claim.” [Tr. 51-52.]

Again, in Article VI of the plan [Tr. 52] there is a reiteration of the retention of jurisdiction by the Court in the following language:

“The court to retain jurisdiction to carry out the plan of arrangement and to pass upon all controversies with creditors and third parties, with like effect as if an order of adjudication were entered herein and George T. Goggin was appointed trustee in bankruptcy.”

After notice duly given to creditors, upon a hearing on the debtor's petition to confirm the second amended plan of arrangement, the Referee in Bankruptcy issued his order confirming the second amended plan of arrangement [Tr. 30-44], which contained the following language:

“It is Hereby Ordered, Adjudged and Decreed that said Arrangement, a copy of which is annexed hereto and marked Exhibit ‘A’, be and it hereby is confirmed. . . .” [Tr. 41.]

The order further provided:

“It Is Further Ordered that this court retains and reserves jurisdiction to determine the amount and validity of all claims of creditors, both secured and unsecured, and the classification of said claims, and all objections that have heretofore been made or that may be made in regard thereto, with a like effect and power as if the above-named debtor had been adjudged a bankrupt and George T. Goggin were the acting trustee in bankruptcy; and that George T. Goggin, as receiver and disbursing agent, shall have the right to object to any and all claims with like effect as if he were acting in the capacity of a trustee in bankruptcy.” [Tr. 43.]

The order confirming the plan contained the required findings that written consents of creditors had been filed with the Court by creditors having provable claims in excess of a majority in number and amount of the total claims, that the arrangement was for the best interests of

the creditors, and that it was fair and equitable [Tr. 40-41].

On the same date that the order confirming the plan was entered, the receiver filed his verified petition for an order subordinating the claim of the Bank of America [Tr. 58-62]. On the same date, the Referee in Bankruptcy issued an order to show cause directing the Bank to appear and show cause why the prayer of the petition should not be granted [Tr. 67]. Thereafter, the receiver filed his supplement to the petition setting forth additional allegations in support of the subordination requested [Tr. 63-66].

It is significant that the order confirming the plan of arrangement contained the Bank's written approval as to form [Tr. 44]. Another positive indication contained in this record that the Bank had actual knowledge that the receiver was attempting to subordinate the Bank's claim to the claims of all other creditors, is contained in the agreement of indemnity given to the receiver by Northrop Aircraft, Inc., which was approved by the Referee in Bankruptcy [Tr. 68-72]: the form of the indemnity agreement also was approved by counsel for the Bank of America [Tr. 71]. It was provided therein that the liability of the indemnitor should not be increased "by reason of any subordination of such claim of the Bank in whole or in part to the claims of other general creditors with respect to the funds in the hands of George T. Goggin as receiver or any part thereof or as a result of any other litigation, controversy or settlement between said

George T. Goggin as receiver and the Bank which affects the status or the amount of said claim” [Tr. 69]. In approving the indemnity agreement, the Referee in Bankruptcy stated in his order that “this court retains jurisdiction of the subject matter and parties to the said agreement pending its final performance or discharge . . .” [Tr. 71]. A few months later there was filed in the bankruptcy proceedings a release and satisfaction of indemnity agreement, whereby the Bank acknowledged that Northrop Aircraft, Inc., had paid, or agreed to pay, the Bank “an amount equal to the amount that it would have received if it had received, from the assets in the hands of the receiver at the date of confirmation of the plan, a dividend upon Northrop’s claim, at the same rate of dividends paid to creditors generally, to the extent necessary to pay its claim in full” [Tr. 77].⁵

On the date set for hearing on the receiver’s petition and the supplement thereto, and the order to show cause issued thereon, the Bank served and filed its response to the order to show cause [Tr. 79] asserting that the Bankruptcy Court was without jurisdiction to hear and determine the matters set forth in the receiver’s petition, and that the facts stated therein did not afford a basis for any relief. At the conclusion of the hearing on that date, the Referee orally ruled that the Court was without jurisdic-

⁵The amount thus paid was estimated by Northrop to be approximately \$90,000.00 [Tr. 69].

tion to determine the controversy and stated that his ruling would be limited to that ground [Tr. 158-160].

Thereafter the receiver served and filed a notice of motion to reconsider the aforesaid oral ruling [Tr. 81-83]; a hearing on said motion was held on March 18, 1949 [Tr. 155-157]. At the conclusion of the hearing, the receiver, through his counsel, asked leave to serve and file an amended petition, which request was thereupon denied [Tr. 155-157].

Thereafter, on March 18, 1949, the Bank prepared a form of order and submitted it to the Referee and served a copy upon counsel for the receiver. The said form of order submitted by the Bank went considerably beyond the oral ruling of the Referee in that the said order contained a recital that all of the objections set forth in the aforementioned response of the Bank of America were well founded. The day following receipt of the said form of order, the receiver filed formal objections to the order in which the receiver set forth the aforesaid variance between the form of order and the oral ruling of the Referee as the grounds for his objections [Tr. 86-91]. Also included in said objections was the request that, if the Referee saw fit to sign such an order as that submitted by the Bank, the receiver have leave to file an amended petition; a copy of the proposed amended petition was attached to said objections [Tr. 90-91]. At a hearing on the aforesaid objections of the receiver to the form of order, the Referee indicated that he had already signed

the proposed form of order [Tr. 162].⁶ The Referee overruled the receiver's objections to the form of order but did permit the receiver to file his amended petition, expressly stating, however, that the original order would stand and the filing of the amended petition was not to be considered as affecting the original order [Tr. 165-166].

The receiver duly filed and perfected his petition for review of the aforesaid order of the Referee to the District Court [Tr. 107-122]. Upon review, the Honorable Harry C. Westover, United States District Judge, affirmed the ruling of the Referee by an order dated January 6, 1950, and entered January 20, 1950 [Tr. 150]. The form of order used by the District Court was objected to by the receiver for the reason that the order made no mention of the receiver's amended petition; the receiver contended that he was entitled to a ruling as to whether or not the amended petition had been considered by the District Court [Tr. 148-150].

This appeal followed.

⁶Under Rule 7 of the Rules of the United States District Court for the Southern District of California (effective January 15, 1944, as amended March 2, 1949) it is provided:

"No document governed by this rule shall be signed by the judge unless opposing counsel shall have endorsed thereon an approval as to form, or shall have failed to file with the judge, within five days from the time of the receipt of a copy thereof, as such time is shown on the original or by affidavit of service, a written detailed statement of the objections thereto and the reasons therefor."

Here there was a failure to comply with this rule.

Specifications of Error.

Appellant contends that the District Court and the Referee erred in the following respects:

1. In holding that the Bankruptcy Court had no jurisdiction to grant the relief sought by the appellant either in his petition and supplement thereto, or in his amended petition to subordinate the claim of the Bank of America.

2. In holding that the receiver did not have the power or authority to file the aforesaid petition for subordination of the claim of the Bank of America.

3. In holding that the aforesaid petition and supplement thereto, and the amended petition failed to state claims upon which the relief therein requested could be granted.

4. In refusing to grant the receiver leave to amend his pleadings, after apparently holding that the original pleadings did not state facts sufficient to constitute a cause of action, such refusal constituting an abuse of discretion.

Summary of Argument.

We do not intend to discuss herein the first ground of objection set forth in the Bank's response filed with the Referee [Tr. 79] to the effect that the Bankruptcy Court had no jurisdiction to entertain the receiver's petition by reason of the pending appeal in this Court involving the propriety of the Bank's attempted exercise of a banker's lien.⁷ We do not feel that this objection was seriously

⁷This matter is now under submission before this Court on rehearing in Case No. 12206.

See footnote 4, *supra*.

urged inasmuch as the distinction between the banker's lien appeal and this appeal is so patently apparent. The banker's lien appeal involved the overruling of the receiver's objections to the Bank's claim in which the receiver contended that the Bank had wrongfully seized certain commercial paper belonging to the debtor under an alleged claim of banker's lien. At all times the receiver has acknowledged that the debtor was indebted to the Bank and has at no time, either in the banker's lien proceeding or in this subordination proceeding, contended that the Bank was not a creditor of the debtor. The substance of the banker's lien litigation was the receiver's counterclaim that the Bank had wrongfully seized and converted certain property belonging to the debtor and had wrongfully credited the value of this property against the Bank's claim. In his objections the receiver prayed that the Bank be required to pay to the receiver the value of the seized property. If the receiver is successful in the banker's lien litigation, the amount of the Bank's claim against the debtor will be increased; therefore, the final result of the banker's lien appeal will liquidate the Bank's claim, which is now in an unliquidated amount.

The present appeal is based upon the premise that the Bank will ultimately have a liquidated claim against the debtor, and the receiver seeks by this proceeding to have the payment of such claim subordinated to the claims of other creditors. In other words, the receiver is seeking to defer any payment of dividends on the Bank's claim until the claims of other creditors have been paid. The fundamental difference between the allowance of the claim as a legal debt of the debtor, and the order of payment of dividends on that claim, has been made abundantly clear by

a consistent line of cases starting with the leading case of *Pepper v. Litton* (1939), 308 U. S. 295, 84 L. Ed. 281, 60 S. Ct. 238, 41 Am. B. R. (N. S.) 279, in which the Supreme Court stated:

“Though disallowance of such claims will be ordered where they are fictitious or a sham, these cases do not turn on the existence or non-existence of the debt. Rather they involve simply the question of order of payment.”⁸

We contend that the judgment of the lower court should be reversed for the following reasons:

1. The Bankruptcy Court had jurisdiction to order the subordination of the payment of the claim of the Bank to the general unsecured creditors of the debtor by reason of the confirmed plan of arrangement, the order of confirmation, and under its inherent jurisdiction over the distribution of the funds or other assets in its possession.

2. The receiver, both under the plan and under the order confirming it, had the right, power, authority and duty to present the facts set forth in his petition to the Bankruptcy Court, and to invoke the equitable jurisdiction of the Court to defer any payment of dividends to the Bank of America until the claims of all other creditors had been paid.

3. The facts set forth in the petition and supplement thereto, or in the amended petition, if proved, would entitle the receiver to the relief prayed for.

⁸See also: *Columbia Gas & Electric Corp. v. U. S.* (1941, 6th Cir.), 151 F. 2d 461; rehearing denied, 153 F. 2d 101; *Cert. den.*, 329 U. S. 737. (The Court modified the order of the Bankruptcy Court so as to subordinate the claim, *not* disallow it.)

ARGUMENT.

I.

The Bankruptcy Court Had Jurisdiction to Order the Subordination of the Payment of the Claim of the Bank to the General Unsecured Creditors of the Debtor.

(a) UNDER THE CONFIRMED PLAN OF ARRANGEMENT.

It is readily apparent from a reading of the plan of arrangement [Tr. 45-56], the form of consents by creditors thereto [Tr. 56-57], and the order confirming the plan of arrangement [Tr. 40-44], that the intention of all the parties was to release to the debtor all of the assets which were being administered by the Bankruptcy Court in the Chapter XI proceedings, free and clear of all liens, claims and debts of creditors, in consideration for which the debtor was to pay to the receiver the sum of \$500,000.00 for administration by the Bankruptcy Court, as if said consideration constituted the estate of an adjudicated bankrupt with the receiver having all the rights, powers and duties of a trustee in bankruptcy.

Article I of the plan divided the creditors into classes, of which the fourth class (Class D) was composed of all creditors except those included in the first three classes [Tr. 46]. The Bank's claim falls into Class D. It is expressly provided in the paragraph creating the class, that jurisdiction of the Bankruptcy Court is reserved to determine the amount and validity of all claims "*and the classification of said claims*" with the reservation of jurisdiction being co-extensive with the jurisdiction that the Court would have had, had the debtor been adjudicated a bankrupt with the receiver acting as trustee in bankruptcy [Tr. 45-46].

In Article IV it is again provided that the receiver shall have the same authority as a trustee in bankruptcy would have after an adjudication “with full right and power to prosecute any and all causes of action, objections to claims, with full right to assert all offsets, counterclaims, and affirmative claims, and any and all other rights that are now vested in him as receiver herein or that would vest in him as trustee in bankruptcy in the event of an order adjudging the above named debtor to be a bankrupt” [Tr. 48].

In Article VI there was recognition of the commencement of a subordination proceeding against the Bank by the receiver in providing that the indemnity liability of Northrop Aircraft, Inc. should not be increased “by reason of any subordination of such claim of the Bank of America, in whole or in part, to the claims of other general creditors with respect to the funds in the hands of ‘the receiver’ or as a result of any other litigation, controversy or settlement between said George T. Goggin and said Bank of America, which affect the status or the amount of said claims” [Tr. 52].

In Article VI the Court retains jurisdiction to pass upon all controversies with creditors and third parties, to like effect as if there had been an adjudication in bankruptcy and George T. Goggin had been appointed trustee in bankruptcy [Tr. 52-53].

Article VII provides for the retention of moneys by the Bankruptcy Court to cover prospective dividends on disputed claims [Tr. 53].

The consents of creditors to the second amended plan of arrangement expressly limit the use of the consents to the terms of the plan. A form of such consent is in-

cluded in the record on this appeal and it clearly appears therefrom that the consenting creditors conditioned their consents upon the terms of the plan itself [Tr. 56-57]. Moreover, the consents of the creditors further provided that the consent "shall not in any manner prejudice the rights, defenses or cause of action that the undersigned, as a creditor, would have, or that George T. Goggin, as receiver, now has, or that George T. Goggin, as trustee in bankruptcy, would have, or any creditor of Salsbury Motors, Inc. would have in the event that Salsbury Motors, Inc. were adjudged a bankrupt and George T. Goggin were duly appointed trustee in bankruptcy. . . ."

There can be no doubt that the plan of arrangement and the consents to the plan reserved jurisdiction in the Bankruptcy Court to determine any controversies with respect to creditors' claims to like effect as if there had been an adjudication in bankruptcy. The appellant's petition to have the claim of the Bank of America subordinated to claims of all other creditors is clearly the type of controversy within the jurisdiction of a Bankruptcy Court where there has been an adjudication in bankruptcy.

Quite apart from the Bankruptcy Court's statutory authority to allow and disallow claims asserted against the bankrupt,⁹ it has long been recognized that a Court of Bankruptcy has the power to postpone payment of dividends upon the admittedly valid claim of a creditor to the claims of other creditors of the same class where the former has been guilty of conduct which, under the ordi-

⁹Sections 2(a)(2), 57(f) and 57(k) of the Bankruptcy Act (11 U. S. C., Secs. 11(a)(2), 93(f) and 93(k).)

nary rules of equity, would make it inequitable for him to share on an equality with other creditors.¹⁰

The leading case dealing with this salutory principle is *Pepper v. Litton* (1939), 308 U. S. 295, 84 L. Ed. 281, 60 S. Ct. 238, 41 Am. B. R. (N. S.) 279, in which the Court stated:

“In the exercise of its equitable jurisdiction, the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.”¹¹

The appellee herein, both before the Referee and the District Court below, made the very same contention that it had unsuccessfully urged to this Court in *Bank of America v. Erickson* (1941, 9th Cir.), 117 F. 2d 796, 45

¹⁰Two of the earliest cases are: *In re Headley* (1899, D. C., Mo.), 97 Fed. 765, 3 Am. B. R. 272; *In re Royce Dry Goods* (1904, D. C., Mo.), 133 Fed. 100, 13 Am. B. R. 257. See also Annotation (1936): “Power of Bankruptcy Court to Adjudicate Equities Among Creditors in Distribution of Dividends,” 100 A. L. R. 660-667.

¹¹The Supreme Court succinctly stated the same principle in another case as follows:

“The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete. *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307, 38 Am. B. R. (N. S.) 692; *Pepper v. Litton*, 308 U. S. 295, 41 Am. B. R. (N. S.) 279; *Bird & Son Sales Corp. v. Tobin* (C. C. A., 8th Cir.), 29 Am. B. R. (N. S.) 171, 78 F. (2d) 371.” *Sampsell v. Imperial Paper & Color Corp.* (1941), 313 U. S. 215, at 219, 45 Am. B. R. (N. S.) 454.

For a thorough discussion of the principle, see *In the Matter of Kansas City Journal-Post Company* (1944, 8th Cir.), 144 F. 2d 791, 57 Am. B. R. (N. S.) 47.

Am. B. R. (N. S.) 503. This Court stated the contention and its disposition thereof in the following language:

“Appellant contends, in the first place, that a justiciable controversy growing out of the agreement to subordinate exists between it and the other creditors; that the bankruptcy court is without jurisdiction to determine the dispute; that the McComb and Hickerson claims should be allowed without prejudice and the creditors relegated to another forum for the adjudication of the controversy.

The argument finds little support in the authorities. The bankruptcy court has undoubted power to subordinate a general claim to other claims in the same category where for any reason, legal or equitable, it ought to be subordinated.”

In holding that the claims of stockholders of a bankrupt corporation should be subordinated to claims of the general unsecured creditors, the Court of Appeals for the 2nd Circuit referred to the recent line of cases of the Supreme Court, from which it deduced the following test:

“The test does ‘not turn on the existence or non-existence of the debt’ nor on the existence of an ‘instrumentality’ or the like; the test is whether the failure to subordinate will ‘work injustice’, will not ‘be fair and equitable to other creditors’, will result ‘in the violation of rules of fair play and good conscience’.”¹²

In the instant case, however, this Court does not have the benefit of any findings by the lower court with respect to this test for the reason that the ruling was made without the taking of any evidence because the Referee and the District Court were of the opinion that the Court was

¹²*In re Loewer's Gambrinus Brewery Co.* (1948), 167 F. 2d 318, at 319.

without jurisdiction to grant the relief requested by the receiver. The receiver is now before this Court seeking a reversal so that he may have an opportunity to prove the allegations of his petition and the supplement thereto, and the amended petition, in order that there can be a determination made as to whether the failure to subordinate the Bank's claim will work injustice on the other creditors of the debtor.

(b) UNDER THE ORDER OF CONFIRMATION.

We have already set forth herein the provisions of the order confirming the plan of arrangement dealing with the reservation of jurisdiction by the Bankruptcy Court. That reservation of jurisdiction is wholly inconsistent with the ruling of the District Court and the Referee that no jurisdiction was reserved to consider a controversy such as that presented by the receiver's petition to subordinate the claim of the Bank of America. The order confirming the plan [Tr. 40-44] expressly referred to the plan of arrangement and annexed a copy thereto as Exhibit "A", thereby making the plan itself a part of the order confirming it [Tr. 41]. Accordingly, all of the arguments set forth in subsection (a) of this brief are equally applicable to the order confirming the plan. The reference to the plan would of itself have been sufficient to answer the objection made by the Bank to the jurisdiction of the Court, but the order contained additional language expressly reserving jurisdiction "to determine . . . the classification of said claims . . . with a like effect and power as if the above named debtor had been adjudged a bankrupt" [Tr. 43]. *How could there be a plainer and more explicit reservation of jurisdiction than that contained in this language of the order?*

The Bank of America took the position before the Referee and the District Court that the measure of the jurisdiction retained by the Bankruptcy Court upon confirmation of a plan of arrangement was the order of confirmation, which the Bank contended must be considered separate and apart from the plan in the event of any variance between the two. While we contend that there is no such variance in this case, if there were any such conflict, it must be resolved in favor of the plan. The reason for this is, of course, that the plan of arrangement upon confirmation becomes a contract between the debtor and all of the creditors which vests certain rights and corresponding duties in the respective parties which the Bankruptcy Court has no power to modify. "In a composition the rights of each creditor are fixed by the terms of the bankrupt's offer, subject only to its confirmation and the judge's order of distribution."¹³

Judge Learned Hand, speaking for the 2nd Circuit, in the case of *Equitable Holding Corp. v. Woody* (1933), 63 F. 2d 751 at 753, 23 A. B. R. (N. S.) 143, stated:

"A composition is a bargain between the bankrupt and his creditors which the court compels dissentients to accept. *In re Kline* (C. C. A. 2nd Cir.), 22 F. (2d) 906, 11 A. B. R. (N. S.) 156. The obligations are to be determined from the language used, as in any other contract."

In the case of *Seedman v. Friedman* (1942, 2nd Cir.), 132 F. 2d 290 at 294, 51 A. B. R. (N. S.) 63, there was a question as to an apparent conflict between a plan of arrangement and the Court's order confirming it. While

¹³*Matter of Pollak Co.* (1936, 2nd Cir.), 86 F. 2d 99, 32 A. B. R. (N. S.) 409.

the Court ultimately construed the order as not being in conflict with the plan, it stated:

“If there is a conflict between the terms of the arrangement and the confirmation order, there is a serious question as to the validity of the latter in view of the language of the statute, § 368, that the court shall retain jurisdiction ‘if so provided in the arrangement’. Professor Moore says that the court has no discretion as to such retention and quotes a House Committee report on a forerunner of the Chandler Act to the effect that the wishes of the creditors should bind the court. 8 Collier on Bankruptcy, 14 Ed. (1941) 1244. . . .”

In the instant case, the creditors’ consents to the plan were expressly conditioned upon the terms of the plan itself, which contained an express reservation of jurisdiction in the Bankruptcy Court to determine controversies such as that presented by the receiver’s petition to subordinate the claim of the Bank. The construction placed upon the confirmation order by the Bank (and apparently adopted by the District Court and the Referee) is, however, in conflict with the plan and, therefore, in derogation of substantial contract rights of the consenting creditors. No notice having been given to the creditors as to any proposed changes in the plan and no creditors having modified their consents to the plan, the Referee’s ruling that the order of confirmation modified the plan amounts to a deprivation of valuable property rights of the consenting creditors without due process of law.

The due process of law required in this situation is clearly set forth in the Bankruptcy Act. Section 364 thereof¹⁴ provides that any alteration or modification of

¹⁴11 U. S. C., Sec. 764.

a plan of arrangement which materially and adversely affects the interest of any creditors who have not in writing assented to the alteration or modification must, prior to confirmation, be submitted to the creditors for their acceptance and the Court must adjourn or reopen the creditors' meetings for that purpose. No such procedure was followed in this case and, therefore, there can be no valid contention that the order of confirmation had the effect of modifying the plan.¹⁵

¹⁵It is significant to note that there is no authority given to the Bankruptcy Court in Chapter XI to modify the confirmed plan of arrangement. The significance of this omission becomes apparent by comparing the provisions to the similar provisions under Chapter X in which the Court is expressly authorized to alter or modify a plan, either before or after confirmation (Sec. 222, 11 U. S. C., Sec. 622) ; but even under Chapter X, the alteration or modification must be submitted for the approval of creditors and stockholders where the Court is of the opinion that their interests will be materially and adversely affected.

The Supreme Court has ruled in a Chapter X proceeding that a redistribution among the claimants of an unwarranted profit received by certain of the claimants subsequent to confirmation of the plan of reorganization did not materially and adversely affect the interests of the claimants under the confirmed plan and thus, that the reorganization Court had jurisdiction to order the claimants who had received such profits to pay the amount thereof over to the trustee for the benefit of all of the other claimants. In *Young v. Higbee Co.* (1945), 324 U. S. 204, 65 S. Ct. 594, 89 L. Ed. 890, 57 A. B. R. (N. S.) 730, the Court relied on Section 222 of the Act as giving the Court this jurisdiction, even after confirmation (Footnote 14 to the Court's opinion). The Court stated:

"It is argued that even though the money paid in excess of the stock value does in equity and good conscience belong to the stockholders, the bankruptcy court is without power to award the relief prayed. Courts of bankruptcy are courts of equity and exercise all equitable powers unless prohibited by the Bankruptcy Act. [Citing cases.] The District Court still has jurisdiction to exercise its powers under the Act both because of its express reservation and because of the provisions of Section 222, 11 U. S. C. A., §622. That power is ample to authorize the court to order an accounting for the funds in dispute here. [Citing cases.]"

In urging that the Bankruptcy Court had no jurisdiction to entertain the receiver's petition, the Bank, both before the Referee and the District Court, seemed to place great reliance on Sections 367 and 368 of the Bankruptcy Act.¹⁶

Section 367 sets forth the procedure to be followed upon confirmation of an arrangement; the last subdivision of that section reads:

“Except as otherwise provided in sections 369 and 370 of this Act, the case shall be dismissed.”

Section 368 reads:

“The court shall retain jurisdiction, *if so provided in the arrangement.*” (Emphasis added.)

It is clear from these provisions of the statute that it is the plan of arrangement that determines the scope of the reserved jurisdiction and not the order confirming it.¹⁷

It has, however, already been demonstrated herein that the plan of arrangement and the order of confirmation are replete with express reservations of jurisdiction in the Bankruptcy Court to hear and determine the matters set forth in the receiver's petitions.

Before the District Court the Bank placed considerable reliance upon the case of *Prudence Realization Corp. v.*

¹⁶11 U. S. C., Secs. 767, 768.

¹⁷In its brief before the District Court the Bank asserted:

“It is clear that under these provisions of the statute we must look to the order confirming the second amended plan of arrangement to determine what jurisdiction was reserved by the Court at that time.” (Page 7 of Bank's *Reply Memorandum of Authorities* filed with the District Court.)

This position is the exact opposite of the statutory provision.

Ferris (1945), 323 U. S. 650, 89 L. Ed. 528, 65 S. Ct. 539. Analysis of the Supreme Court's opinion in that case, however, demonstrates that it supports the appellant's position herein and not the appellee's.¹⁸

The principal problem presented to the Supreme Court in *Prudence Realization Corp. v. Ferris* was to distinguish the earlier case of *Prudence Realization Corp. v. Geist* (1942), 316 U. S. 89, 86 L. Ed. 1293, 62 S. Ct. 978, which arose out of a related corporate reorganization. Both the *Geist* and *Ferris* cases involved the problem of whether the reorganization court had jurisdiction to hear and determine the question of whether certain security holders of the reorganized corporation should be subordinated in claim position to other security holders. In the *Geist* case, the Supreme Court held that the reorganization court had jurisdiction and in the *Ferris* case it held that it did not. The distinction is well stated by the Supreme Court

¹⁸This case as well as *Prudence Realization Corp. v. Geist* (1942), 316 U. S. 89, 86 L. Ed. 1293, 62 S. Ct. 978, involve a corporate reorganization proceeding under Section 77(b) of the earlier Bankruptcy Act. Reorganization proceedings are considerably different from proceedings for an arrangement under Chapter XI of the present Bankruptcy Act. The corporate reorganization provisions are now included in Chapter X of the Bankruptcy Act (11 U. S. C., Secs. 501-676). An examination of Chapter X will reveal that there is no provision therein similar to Section 368 of the present Act which is quoted in the text, providing that the Court shall retain jurisdiction if so provided in the arrangement. The only provision in Chapter X which is remotely similar to Section 358 is Section 266 (11 U. S. C., Sec. 626) which makes provision for the transfer by the bankruptcy administrator to the reorganized debtor free and clear of all claims "except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan . . ." (Emphasis added.) Conceivably by reason of this section and the specific mention of the plan and the order, it could be argued under Chapter X there might be a variance between the reservation of jurisdiction contained in the plan and the order of confirmation. This is clearly not possible under Chapter XI.

in the *Ferris* case for it is pointed out that in the *Geist* case, jurisdiction was expressly reserved in the reorganization court to determine the question, whereas in the *Ferris* case, the reorganization court expressly refused to retain jurisdiction and provided that the parity question should be determined by a "court of competent jurisdiction." As stated by the Supreme Court, "In short, while the provisions for adjudication of the parity question in the *Geist* case clearly contemplated the determination of it as part of the reorganization proceedings by the Bankruptcy Court itself, in the present case, the Bankruptcy Court washed its hands of the problem and left the parties to litigate the question in another forum."¹⁹ Our case is like the *Geist* case and under the provisions of the confirmed plan of arrangement, it was definitely contemplated that all questions pertaining to the claims, any subordination of claims or the classification of claims should be a part of the proceedings to be conducted by the Bankruptcy Court itself.

Another element of the *Ferris* case that is significant is that the Bankruptcy Court had entered a final decree discharging the trustees and closing the case. It is clear that there is a great deal of difference in the Bankruptcy Court's jurisdiction during the period after confirmation

¹⁹The case of *In re East Boston Coal Co.* (D. C., Penna., 1942), 47 Fed. Supp. 593, 51 A. B. R. (N. S.) 626, which was relied upon by the Bank below, presented a question identical to that before the Supreme Court in the *Ferris* case. This case, too, was a reorganization proceeding and not a proceeding for an arrangement with creditors. The confirmed plan of reorganization expressly provided that it should not in any way alter the legal status of the debtor's lessee. Thus, when the lessee petitioned the reorganization Court for reformation of the lease, the Court ruled that this was a matter entirely foreign to the plan of reorganization over which the Court had no jurisdiction.

of a plan of arrangement and the jurisdiction the Court might have after a final order discharging the receiver and closing the estate. This difference is recognized in the statute itself,²⁰ the reasons for which are self-evident. Upon confirmation of a plan of arrangement, the Court has in its possession the consideration which has been deposited by the debtor which the Court must administer pursuant to the plan. It has whatever jurisdiction might be necessary to supervise the distribution of the funds *in custodia legis*. After the plan has been consummated and the consideration distributed, there is nothing further for the Court to do and, thus, a final decree is entered discharging the receiver and closing the estate.²¹ Thus, prior to the final decree, the plan is executory and the Court has jurisdiction to carry out the plan, but after it has been fully executed there is nothing further to be done.

The only case cited by the Bank in the lower court that involved a Chapter XI proceeding was *Matter of Gordon* (D. C. N. Y. 1942), 44 Fed. Supp. 581, 51 A. B. R. (N. S.) 83, affirmed *per curiam* (1942, 2nd Cir.), 131 F. 2d 863. In that case the debtor, who was permitted to con-

²⁰Sections 369 and 372 of the Bankruptcy Act (11 U. S. C., Secs. 769, 772).

²¹This was the situation in *In Matter of Wedgewood Hotel Co.* (1942, 7th Cir.), 125 F. 2d 482, 48 A. B. R. (N. S.) 482, which was cited by the Bank to the Court below. The jurisdiction of the reorganization Court was invoked subsequent to the entry of the final order discharging the debtor and the trustee. The Court held that there was no jurisdiction after the final order. The distinction between this situation and the jurisdiction of the reorganization Court after confirmation but before the final order has been noted by the Court of Appeals for the 7th Circuit. *Matter of Hermitage Building Corp.* (1938), 100 F. 2d 597, 38 A. B. R. (N. S.) 667; *Matter of 4145 Broadway Hotel Co.* (1942), 131 F. 2d 120, 51 A. B. R. (N. S.) 162.

tinue the operation of his business under a confirmed plan of arrangement, defaulted in his obligations under the arrangement. The plan, as confirmed, made an express provision that upon such a default, title to all of the debtor's assets was to vest in a disbursing agent named by the Court. The debtor sought a change in the distribution of the assets from that set forth in the plan of arrangement and the Court quite properly held that inasmuch as no jurisdiction was reserved, there was no jurisdiction in the Court to entertain the application of the debtor to reopen the proceedings so as to alter the plan. Clearly, such is not our case. Here there was an express reservation of jurisdiction to hear and determine any and all controversies and classifications with respect to any claim that had been filed against the debtor.

(c) UNDER THE BANKRUPTCY COURT'S INHERENT JURISDICTION OVER THE DISTRIBUTION OF THE FUNDS OR OTHER ASSETS IN ITS POSSESSION.

Quite apart from the provisions of the plan of arrangement and the order of confirmation, which, as has been shown, expressly reserved jurisdiction in the Court to grant the relief sought by the receiver in his petition, the Bankruptcy Court has exclusive jurisdiction over the distribution of the funds deposited with it by the debtor pursuant to the plan.

Under Section 337 of the Bankruptcy Act²² it is provided that the debtor shall deposit the consideration to be distributed to the creditors "subject to the order of the court." Again, Section 369 of the Act²³ provides that the

²²11 U. S. C., Sec. 737.

²³11 U. S. C., Sec. 769.

“court shall *in any event* retain jurisdiction until the final allowance or disallowance of all debts, affected by the arrangement . . . which . . . have been proved, but not allowed or disallowed, . . . or . . . are disputed or unliquidated. . . .” This reservation with respect to any unallowed or disputed or unliquidated claims is, of course, independent of any express reservation in the plan. Professor Collier has stated that the Court has jurisdiction “over the distribution of the money deposited by the debtor for priority debts and for the costs and expenses, and over the distribution of the consideration, if any, deposited by the debtor for creditors. That money and consideration are deposited ‘subject to the order of the court’ and are distributed ‘subject to the control of the court.’”²⁴ In our case, the consideration of \$500,000.00 paid into the Bankruptcy Court under the plan of arrangement constituted the *res* to which the proceedings pertained and over which the Bankruptcy Court has exclusive jurisdiction.

In Matter of Pollak Co., Inc. (1936, 2nd Cir.), 86 F. 2d 99, 32 A. B. R. (N. S.) 409, the Court described a controversy between a trustee and a creditor with respect to their respective rights to the consideration which had been deposited under a confirmed plan of arrangement as follows:

“It relates only to distribution of the composition deposited, as to which the court retains jurisdiction, so long as any of the deposit remains undistributed.”

²⁴⁸ Collier on Bankruptcy (14th Ed.), 1241.

In the case of *In re Hunter Hotel Enterprises* (D. C. N. Y., 1941), 44 Fed. Supp. 614 at 616, the Court stated after referring to Section 369 of the Bankruptcy Act:

“This section clearly empowers the court to determine controversies with respect to claims which have not been finally settled at the date of confirmation where there is a fund available out of which a favorable judgment might be satisfied.”

Section 312 of the Bankruptcy Act²⁵ provides that in proceedings under Chapter XI the jurisdiction, powers and duties of the Bankruptcy Court shall be the same as the Court would have in an ordinary bankruptcy proceeding immediately following an adjudication in bankruptcy, where not otherwise inconsistent with the provisions of Chapter XI. Of course in this case resort need not be had to that section of the statute by reason of the express inclusion in the plan of the reservation of jurisdiction to the same extent as if the debtor had been adjudicated a bankrupt with the receiver having been elected trustee in bankruptcy. The section is merely mentioned herein to demonstrate that even without such express reservation the Court would have had jurisdiction to hear and determine the receiver's petitions.

A very recent decision of the Supreme Court gives clear recognition to this fundamental aspect of the jurisdiction of the Court in a Chapter XI proceeding. Thus in *Manu-*

²⁵11 U. S. C., Sec. 712.

facturers Trust Company v. Becker et al. (1949), 338 U. S. 304, 94 L. Ed. 99 and 70 S. Ct. 127, which was a Chapter XI proceeding in which the trustee sought to subordinate the claims of certain creditors of the corporation to the claims of all the other creditors. This controversy between the trustee and the claimants whose claims he sought to subordinate arose after confirmation of the plan. Although the Supreme Court ruled that on the evidence in the record there was not a sufficient basis to subordinate the claims, there was implicit in its ruling a recognition that the Bankruptcy Court had jurisdiction to hear and determine the trustee's petition to subordinate. The Court stated:

“Since the power of disallowance of claims, conferred on the bankruptcy court by §2 of the Act, 30 Stat. 545, 11 U. S. C. Sec. 11, embraces the rejection of claims ‘in whole or in part, according to the equities of the case’ (*Pepper v. Litton*, 308 U. S. 295, 304-305 (1939)), the court may undoubtedly require limitation of the amount of claims in view of equitable considerations. . . .”²⁶

In that case there was a full hearing on the trustee's petition to subordinate and the ruling was on the basis of the evidence. In our case the lower court gave no opportunity to hear the equitable considerations for the reason that it ruled that it was without jurisdiction to entertain the petition.

²⁶338 U. S. 304, at 309, Footnote 7.

II.

The Receiver, Both Under the Plan and Under the Order Confirming It, Had the Right, Power, Authority and Duty to Present the Facts Set Forth in His Petition to the Bankruptcy Court, and to Invoke the Equitable Jurisdiction of the Court to Defer Any Payment of Dividends to the Bank of America Until the Claims of All Other Creditors Had Been Paid.

This point is but a corollary to the first point made herein as to the jurisdiction of the Court. It is made separately only for the reason that the Bank of America made a separate objection on this ground.²⁷

By reason of the identity of this point to the first point made herein, all of the argument made under Point I is equally applicable here. Suffice it to say that under the plan the receiver was expressly given all the authority that a trustee in bankruptcy might have had. Although the Bank has repeatedly conceded that a trustee in bankruptcy would have such authority, it argues that the receiver in this case does not have such authority.²⁸ Here again the

²⁷The referee indicated that the lack of jurisdiction objection was the same as the objection made by the bank to the effect that the receiver was without authority to obtain the type of relief sought in his petition for subordination [Tr. 160].

²⁸In its brief before the District Court, the Bank stated:

“Counsel for the Receiver argues quite strenuously . . . that the Bankruptcy Court and a Trustee in Bankruptcy have the power and jurisdiction to subordinate the payment of dividends on claims as between creditors of the same class. We have no quarrel with these authorities. As counsel has pointed out, we conceded before the Referee that a Bankruptcy Court has the general power and jurisdiction in a pending bankruptcy proceeding to adjudicate such controversies. Our point is that *in this proceeding* and under the order of confirmation entered by the referee, jurisdiction to determine such contro-

Bank points to the order of confirmation as somehow limiting the authority, but our position with respect to that contention has already been set forth herein.

The following are but a few of the numerous cases recognizing the authority of a trustee in bankruptcy to bring appropriate proceedings before the Bankruptcy Court to determine whether the claims of certain creditors should be subordinated to other creditors of the same class.

Pepper v. Litton, 308 U. S. 295, 41 Am. B. R. (N. S.) 279, 84 L. Ed. 281, 60 S. Ct. 238;

American Surety Co. v. Sampsell (1946), 327 U. S. 269, 90 L. Ed. 663, 66 S. Ct. 571;

Goldie v. Cox (1942, 8th Cir.), 130 F. 2d 695, 50 A. B. R. (N. S.) 560;

In re Loewer's Gambrinus Brewery Co. (1948, 2nd Cir.), 167 F. 2d 318;

Bank of America National Trust & Savings Association v. Erickson (1941, 9th Cir.), 117 F. 2d 796, 45 A. B. R. (N. S.) 503.

The authority of the Bankruptcy Court's administrator to initiate such proceedings is expressly provided in Section 341 of the Act²⁹ wherein it gives him all of the powers and duties that a trustee in bankruptcy would have after the entry of an order of adjudication in an ordinary bankruptcy proceeding, which authority was expressly con-

versies has not been reserved, and under the statute and decisions the Court's general equity powers and general bankruptcy powers have been limited to the jurisdiction reserved by the order confirming the plan."

²⁹11 U. S. C., Sec. 741.

ferred on the receiver in this case by the confirmed plan of arrangement.

There is a similar authorization to the Bankruptcy Court's officers in all of the other types of proceedings covered by the Bankruptcy Act.³⁰

The Bank has strenuously urged that the case of *Wallace v. Ohio Valley Bank* (1924, 4th Cir.), 2 F. 2d 53, 4 A. B. R. (N. S.) 594, supports its position. We respectfully submit, however, that the case supports the position of the appellant herein. In that case the facts involved and the ruling are stated by the Court as follows:

“Another of the trustee's exceptions goes to the entire claim of the bank. It alleges that the bank for the purpose of getting undeserved credit for the bankrupt knowingly made false statements as to the latter's financial condition and that those to whom they were made acted upon them and suffered thereby. The trustee argues that in consequence the bank is not entitled to receive anything from the bankrupt estate until after its other creditors have been paid in full. To sustain this exception the trustee relies upon the telegram and the letter sent by the bank to Greenbaum and, as we understand the record, upon them alone. If they made the bank liable to anyone

³⁰Chapter VIII, Agricultural Compositions and Extensions, Section 75(m) (11 U. S. C., Sec. 203(m));

Railroad Reorganization, Section 77(c)(2) (11 U. S. C., Sec. 205(c)(2));

Chapter X, Corporate Reorganization, Section 114 (11 U. S. C., Sec. 514);

Chapter XI, Real Property Arrangements, Section 441 (11 U. S. C., Sec. 841);

Chapter XIII, Wage Earners' Plan, Section 636 (11 U. S. C., Sec. 1036).

as to which we intimate no opinion whatever, it was to Greenbaum. If anyone was deceived by them, it was Greenbaum and it alone suffered from them. The money the bankrupt obtained from it went to swell the bankrupt's resources and to a greater or less extent benefited the bankrupt's other creditors. As representing them, the trustee has not been hurt. Doubtless a case can be conceived in which a creditor of a debtor in failing circumstances may for its own purposes seek by knowingly false statements to obtain credit for the debtor from any or from all who may deal with the latter. Under such conditions it may be that the trustee as representing the creditors generally has the right to insist that in the distribution of the bankrupt's estate, the improper action of the one creditor shall estop it from competing with its victims, but such rule of law, if it exists, has no application to the instant case. The learned court below was right in overruling this exception."

It is apparent from a reading of the above quoted portion of the opinion that the Court recognized that the trustee would have authority to bring the controversy to the court's attention for determination. The Court affirmed the ruling against the trustee because the trustee had failed to prove that the alleged inequitable conduct of the bank affected any more than one creditor, but recognized the possibility of the trustee's successfully subordinating the claim of the bank if he could show that the course of conduct affected all of the unpaid creditors of the bankrupt. The doubts expressed by the Court as to

the right to subordinate a claim under such circumstances whereby all of the creditors were affected have now been removed by the line of Supreme Court decisions commencing with *Pepper v. Litton*. The Court of Appeals for the Third Circuit has recently had occasion to make the following observation on the current trend of decisions broadening the scope of the jurisdiction of the Bankruptcy Court:

“The tendency of judicial interpretation of the Act has been in the direction of progressive liberalization in respect of the operation of the bankruptcy power so as to meet the challenge of present day economic and business conditions. *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 1935, 294 U. S. 648, 675, 676, 55 S. Ct. 595, 79 L. Ed. 1110. Among the powers granted under the Act are *the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto*. The bankruptcy court may invoke its equitable powers to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done. By reason of the express provisions of Sec. 2 and Sec. 57, sub. k, these powers are to be exercised in the allowance, disallowance or subordination of claims according to the equities of the case. *Pepper v. Litton*, 1939, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281.”

(*In re International Power Securities Corporation* (1948), 170 F. 2d 399 at 402.)

In our case, it was alleged in the supplement to the original petition that "the current unpaid trade creditors in the within reorganization proceedings extended credit to the debtor substantially in reliance upon the position taken by the Bank of America and the misinformation circulated by it in connection with the financial condition of the debtor and the purported financial support thereof by Northrop Aircraft, Inc.; that the Bank of America well knew that the said creditors would so rely upon the facts as alleged hereinabove in extending credit to the debtor herein" [Tr. 65]. A similar allegation is contained in the amended petition of the trustee [Tr. 104].

By reason of the ruling of the Referee and District Court below, the receiver has never had an opportunity to prove those allegations. Of course, if he fails in his proof and is able to show that only one or two creditors were misled by the Bank's conduct, his attempt to subordinate the claim of the Bank may be unsuccessful as to other creditors. In asking this Court to reverse the rulings below, the receiver is merely asking to be afforded his day in court.

The Bank has also relied on *In re Railroad Supply Co.* (1935, 7th Cir.), 78 F. 2d 530, 29 A. B. R. (N. S.) 444, but that case is not in point because it involved the attempt of one creditor in a bankruptcy proceeding to subordinate the claim of another creditor. The Bank should be well aware of this distinction because this Court has already had occasion to indicate its view to the Bank with respect to the applicability of the *Railroad Supply* case to a

situation where the evidence showed that all of the creditors had been affected by the conduct complained of. In *Bank of America v. Erickson* (1941, 9th Cir.), 117 F. 2d 796, 45 A. B. R. (N. S.) 503, this Court stated:

“ . . . Appellant cites *In re Railroad Supply Co.* (C. C. A., 7th Cir.), 29 Am. B. R. (N. S.) 444, 78 F. (2d) 530, as supporting its contention. There the court declined to defer distribution pending disposition of a dispute between two creditors whose controversy was of no concern to other creditors or to the estate. The Circuit Court of Appeals affirmed, believing the course discretionary and holding that the discretion had not been abused. The decision obviously does not support appellant. The present agreement affects all creditors, and a determination in bankruptcy of the rights fixed by it is essential to an orderly administration of the estate.”³¹

³¹The other cases that were relied upon by the Bank before the Referee and the District Court involve identical situations with identical holdings. (*Ingram v. Lehr* (1930, 9th Cir.), 41 F. 2d 169, 16 A. B. R. (N. S.) 215; *Matter of Bowman Hardware & Electric Co.* (1933, 7th Cir.), 67 F. 2d 792, 24 A. B. R. (N. S.) 405.) In each case the respective court ruled that the trustee did not prevail because he was able to show that the conduct complained of misled only one creditor of the estate. The Bank also cited *Moore v. Bay* (1931), 284 U. S. 4, 76 L. Ed. 133, but did not make clear just how the rule of that case has any application to the instant case; appellant has no quarrel with the rule of *Moore v. Bay* and does not attempt, in support of his position, either to apply it or to avoid it.

III.

The Facts Set Forth in Petition and Supplement Thereto, or in the Amended Petition, if Proved, Would Entitle the Receiver to the Relief Prayed For.

The authorities discussed and referred to in the preceding portions of this brief, establish the rule that a Bankruptcy Court has jurisdiction, upon a proper showing, to subordinate the payment of the claims of one creditor to those of other creditors of the same class where such subordination will further the ends of justice and equity. While the Referee orally expressly refused to hold that the pleadings of the receiver did not state facts sufficient to entitle him to the relief prayed for [Tr. 159-160], the Referee's written order [Tr. 83], and the order of the District Court affirming the Referee [Tr. 150] are subject to the interpretation that the pleadings of the receiver were substantially deficient, because both orders contain a recital that all the objections set forth in the Bank's response are well founded.

We strenuously urge that in this respect the District Court and the Referee erred, which error was compounded by the refusal to grant the receiver permission to amend his pleadings. While the pleadings were lengthy, their import can be summarized as follows [Tr. 58-66]:

The Bank of America was thoroughly familiar with the many financial reports regularly submitted to it by the debtor. These reports showed that for a considerable period of time prior to the commencement of the Chapter XI proceedings, the debtor was insolvent and was in default under its loan agreement with the Bank. During this period, the Bank

was aware of the fact that the debtor was giving the Bank as a credit reference to all persons making credit inquiries of the debtor and that in response to such inquiries, the Bank, despite the aforesaid knowledge of the unsound financial condition of the debtor, gave information to all who inquired that the debtor was in sound financial condition and that it was a wholly-owned subsidiary of Northrop Aircraft and indicated that Northrop would pay the debts of Salisbury, the debtor herein. The Bank gave similar information to credit agencies, which information the Bank knew would be included in financial reports distributed by those agencies and which reports would be used by persons in determining whether or not to extend credit to the debtor.³² The persons who are now the existing unsecured trade creditors of the debtor, relied upon this misinformation furnished by the Bank in determining to extend credit to the debtor. At all times referred to in the pleadings, the

³²This Court has recently had occasion to comment on the purpose of such credit reference reports in *Yates v. Boteler* (1947, 9th Cir.), 163 F. 2d 953, in which it was held that the giving of false financial information to Dun & Bradstreet was a sufficient basis to deny a discharge in bankruptcy. The Court observed, "The appellant is described by his counsel as being an unlearned man, unversed in the devious ways of accountancy. But we doubt that any practical businessman of the present day could be so naive as to be unaware of the purpose for which credit agencies are established." (163 F. 2d at 956.)

The receiver's amended petition contained a positive allegation that the Bank had given false information pertaining to the debtor to Dun & Bradstreet [Tr. 99].

Bank knew that the debtor was insolvent and was in default under its loan agreement with the Bank.³³

The foregoing summary of the pleadings relates only to the original pleadings. The amended petition of the receiver was not ruled upon by the Referee and, apparently, was not ruled upon by the District Court because the Referee indicated that he would not consider the amended petition in connection with his ruling, having expressly refused to give the receiver leave to file it [Tr. 165-166]. The amended petition contained a more complete statement of facts upon which the receiver relied in support of his prayer to subordinate the claim of the Bank [Tr. 92-107].

No purpose would be served by repeating in this portion of the brief the references to the numerous cases recognizing the power and duty of the Bankruptcy Court to grant such relief when the circumstances warrant it. A few of the cases on this point are collected in the foot-

³³The pleadings contained separate and alternative allegations concerning subordination of the Bank's claim with respect to the \$75,000.00 paid to the receiver by Northrop in settlement of the receiver's objections to Northrop's claim [Tr. 60-61]. Subsequently, however, the Bank obtained from Northrop an amount equal to the amount that the Bank would have received from the Northrop dividend [Tr. 76-78]. The exact amount of the payment does not appear in the record but an estimate is made in the original indemnity agreement in the sum of approximately \$90,000.00 [Tr. 69]. By reason of this payment, the Bank has released the receiver from any liability with respect to any dividends from the Northrop claim unless additional assets are recovered by the receiver [Tr. 78].

note.³⁴ For the convenience of the Court we have included as an appendix to this brief, references to the leading bankruptcy texts dealing with this subject.

One of the cases which is of particular significance is *Columbia Gas & Electric Corporation v. United States, et al.* (1945, 6th Cir.), 151 F. 2d 461, rehearing denied 135 F. 2d 101, *Cert. den.* 329 U. S. 737. That case involved a Chapter X proceeding in which the trustee had successfully objected to the claim of Columbia Gas & Electric Corporation. The basis for the objection was that Columbia Gas & Electric had acquired its claim against the debtor as a part of a scheme in violation of the Anti-Trust Laws to obtain a monopoly in the field in which the debtor had been engaged. The Court of Appeals modified the holding by providing that the claim should not be disallowed but should be subordinated to the claims of all

³⁴ *In re Headley* (1899, D. C., Mo.), 97 Fed. 765, 3 A. B. R. 272;

In re Royce Dry Goods (1904, D. C., Mo.), 133 Fed. 100, 13 A. B. R. 257;

Carter v. Bogden (1926, 8th Cir.), 13 F. 2d 90, 8 A. B. R. (N. S.) 247;

Bird & Sons v. Tobin (1935, 8th Cir.), 78 F. 2d 371, 100 A. L. R. 654, 29 A. B. R. (N. S.) 171;

Pepper v. Litton (1939), 308 U. S. 295, 84 L. Ed. 281, 60 S. Ct. 238, 41 A. B. R. (N. S.) 279;

Bank of America v. Erickson (1941, 9th Cir.), 117 F. 2d 796, 45 A. B. R. (N. S.) 503;

Goldie v. Cox (1942, 8th Cir.), 130 F. 2d 695, 50 A. B. R. (N. S.) 560;

Prudence Realization Corp. v. Geist (1942), 316 U. S. 89, 86 L. Ed. 1293, 62 S. Ct. 978;

Columbia Gas & Electric Corp. v. U. S. (1945, 6th Cir.), 151 F. 2d 461; rehearing denied, 153 F. 2d 101; *Cert. den.*, 329 U. S. 737;

In re Loewer's Gambrinus Brewery Co. (1948, 2nd Cir.), 167 F. 2d 318.

other creditors by reason of the conduct of the claimant which was found to be detrimental and prejudicial to the debtor and all of the creditors thereof. In denying a rehearing, the Court of Appeals stated:

“We have given careful consideration to the petition and the argument for modification contained therein. (1) We have noted the observation in *Prudence Realization Corp. v. Geist, supra*, wherein the Supreme Court, in referring to the Court of Appeals decision therein, said [316 U. S. 89, 62 S. Ct. 981]: ‘It recognized also that the equity powers of the bankruptcy court may be exerted to subordinate the claims of one claimant to those of others of the same class where his conduct in acquiring or asserting his claim is contrary to established equitable principles.’ Putting aside the question whether the recited observation bore upon decision, in view of the specific facts of the Prudence case, we find ourselves unable to construe it as a limitation upon the equity powers of the court to subordinate claims acquired in pursuit of illegal or inequitable conduct to those of creditors of a single class where it has been made clear, as in the present case, that the inevitable result of established illegal or inequitable conduct has irrevocably impaired the interests of creditors of every class, however difficult it may be at a later date to measure such impairment.” (153 F. 2d 101-102.)³⁵

³⁵The only case cited by the Bank as being contrary to this fundamental equitable principle is *Crowder v. Allan West Commission Co.* (1913, 8th Cir.), 213 Fed. 177, 32 A. B. R. 134. Whether or not the age of the case renders it of doubtful authority today in the light of the recent trends, it is clearly distinguishable from our case. There the Court of Appeals affirmed the trial court’s refusal to subordinate the claim of a creditor be-

Conclusion.

The ruling of the Referee and the District Court places the conduct of the Bank as set forth in the receiver's pleadings beyond the reach of the Bankruptcy Court. The authorities hereinabove referred to would require, upon proof of the conduct complained of, that the claim of the Bank be subordinated to the claims of all other creditors. The record in this case reveals that even if the Bank's claim were to be subordinated to the claims of all other creditors, the Bank would still fare better with respect to its *pro rata* recovery from the debtor's estate than all of the other creditors whom the receiver has alleged were misled by the conduct of the Bank. The Bank's claim, as filed in this proceeding, was filed as a partially secured debt [Tr. 124-128]. The security consisted of a deed of trust on the real estate owned by the debtor [Tr. 135-147]. The face of the claim shows, however, that the security was given to secure an indebtedness evidenced by a promissory note in the sum of \$180,000.00 [Tr. 125, 127-129], but the Bank was able to take advantage of the provision in the deed of trust that it was given to secure any future advances that might have been made by the Bank to the debtor [Tr. 125, 137]. Although the printed record before this Court does not make it apparent, in the original deed of trust this catch-all clause was buried

cause there was no showing that the creditor had given false information to other creditors. There was merely an omission to give information to creditors as to all of the facts within the knowledge of the creditor whose claim the trustee sought to subordinate. In our case, it is alleged that the Bank knowingly gave false and misleading information. If these allegations are proved, the receiver would be entitled to the relief requested and there is nothing in the *Crowder* case in any way contrary thereto.

in a mass of small print, along with the more usual provisions of the normal type of deed of trust.

The Bank asserted that the value of the security at the time of the commencement of the bankruptcy proceedings was in excess of \$300,000.00 [Tr. 126], on which the Bank asserted its rights, notwithstanding the fact that the note it was given to secure had been paid down to \$159,300.00 [Tr. 129]. The Bank was able to obtain from Northrop Aircraft, the parent corporation of the debtor in these proceedings, approximately \$90,000.00 [Tr. 76-78], although the receiver had alleged that the Bank was the one creditor that had actual knowledge that Northrop was not guaranteeing the indebtedness of the debtor; the Bank had exacted from Northrop an agreement to subordinate payment of all of Northrop's claims against the debtor, to the claims of the Bank of America [Tr. 61]. The Bank was further able to better its position by reason of the attempted exercise of an alleged banker's lien and offset by means of which the Bank seized commercial paper and merchandise of a value of approximately \$175,000.00 [Tr. 126].³⁶

It clearly appears from these facts that the Bank will succeed in its efforts to realize 100 cents on the dollar on all of the indebtedness owing from the debtor to the Bank, either as the result of dividends received out of the bankruptcy proceeding or as the result of the assertion of an alleged moral obligation against the parent of the debtor to make the Bank whole [Tr. 103]. But the appellant is

³⁶This is the matter which is now pending before this Court in the proceedings numbered 12206 between the same parties as are involved in the instant appeal.

Conclusion.

The ruling of the Referee and the District Court places the conduct of the Bank as set forth in the receiver's pleadings beyond the reach of the Bankruptcy Court. The authorities hereinabove referred to would require, upon proof of the conduct complained of, that the claim of the Bank be subordinated to the claims of all other creditors. The record in this case reveals that even if the Bank's claim were to be subordinated to the claims of all other creditors, the Bank would still fare better with respect to its *pro rata* recovery from the debtor's estate than all of the other creditors whom the receiver has alleged were misled by the conduct of the Bank. The Bank's claim, as filed in this proceeding, was filed as a partially secured debt [Tr. 124-128]. The security consisted of a deed of trust on the real estate owned by the debtor [Tr. 135-147]. The face of the claim shows, however, that the security was given to secure an indebtedness evidenced by a promissory note in the sum of \$180,000.00 [Tr. 125, 127-129], but the Bank was able to take advantage of the provision in the deed of trust that it was given to secure any future advances that might have been made by the Bank to the debtor [Tr. 125, 137]. Although the printed record before this Court does not make it apparent, in the original deed of trust this catch-all clause was buried

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It clearly appears from these facts that the Bank will succeed in its efforts to realize 100 cents on the dollar on all of the indebtedness owing from the debtor to the Bank, either as the result of dividends received out of the bankruptcy proceeding or as the result of the assertion of an alleged moral obligation against the parent of the debtor to make the Bank whole [Tr. 103]. But the appellant is

³⁶This is the matter which is now pending before this Court in the proceedings numbered 12206 between the same parties as are involved in the instant appeal.

not relying on these facts on this appeal. The appellant is merely asking, on behalf of all of the unsecured and unpaid creditors of the debtor, to have the opportunity to prove that the Bank was guilty of such conduct in its dealings with the other creditors of the debtor as to require, under the governing authorities, the subordination of the Bank's claim against the debtor to the claims of those creditors of the debtor who have suffered, and will suffer, by reason of false and misleading information given to them by the Bank.

The record in this case requires a reversal of the rulings below. The Bankruptcy Court clearly has jurisdiction to subordinate the claim of one creditor to the claim of all others upon proof of the facts alleged by the receiver in his petition for subordination. Appellant appears before this Court on this appeal on behalf of all of the creditors of the debtor, asking for his day in court, requesting merely that he be allowed the opportunity to prove the allegations of his petition and supplement thereto, which, for purposes of this appeal, are admitted. Appellant also urges that the ruling of this Court should include the authorization for the receiver to proceed on his amended petition,³⁷ which includes more complete allegations by reason of additional information acquired by the receiver through use of the discovery procedure provided by the Federal Rules of Civil Procedure.

³⁷Although the Bankruptcy Court expressly refused to consider or rule upon the amended petition, we respectfully urge this Court to pass upon the sufficiency of the amended petition. Only in this way will the trial court have the benefit of this Court's views on the amended petition in the event there is a reversal of the lower court's ruling and the case remanded for further proceedings.

If the rulings below are to be sustained, the necessary implication is that under the Bankruptcy Act, a creditor who has knowingly and wilfully given false information to other creditors, on the basis of which said other creditors extended credit to the bankrupt, can participate in the proceeds of the bankrupt's assets on an equal basis with the very creditors it misled. We do not believe that such conduct has suddenly become beyond the reach of the Bankruptcy Court.

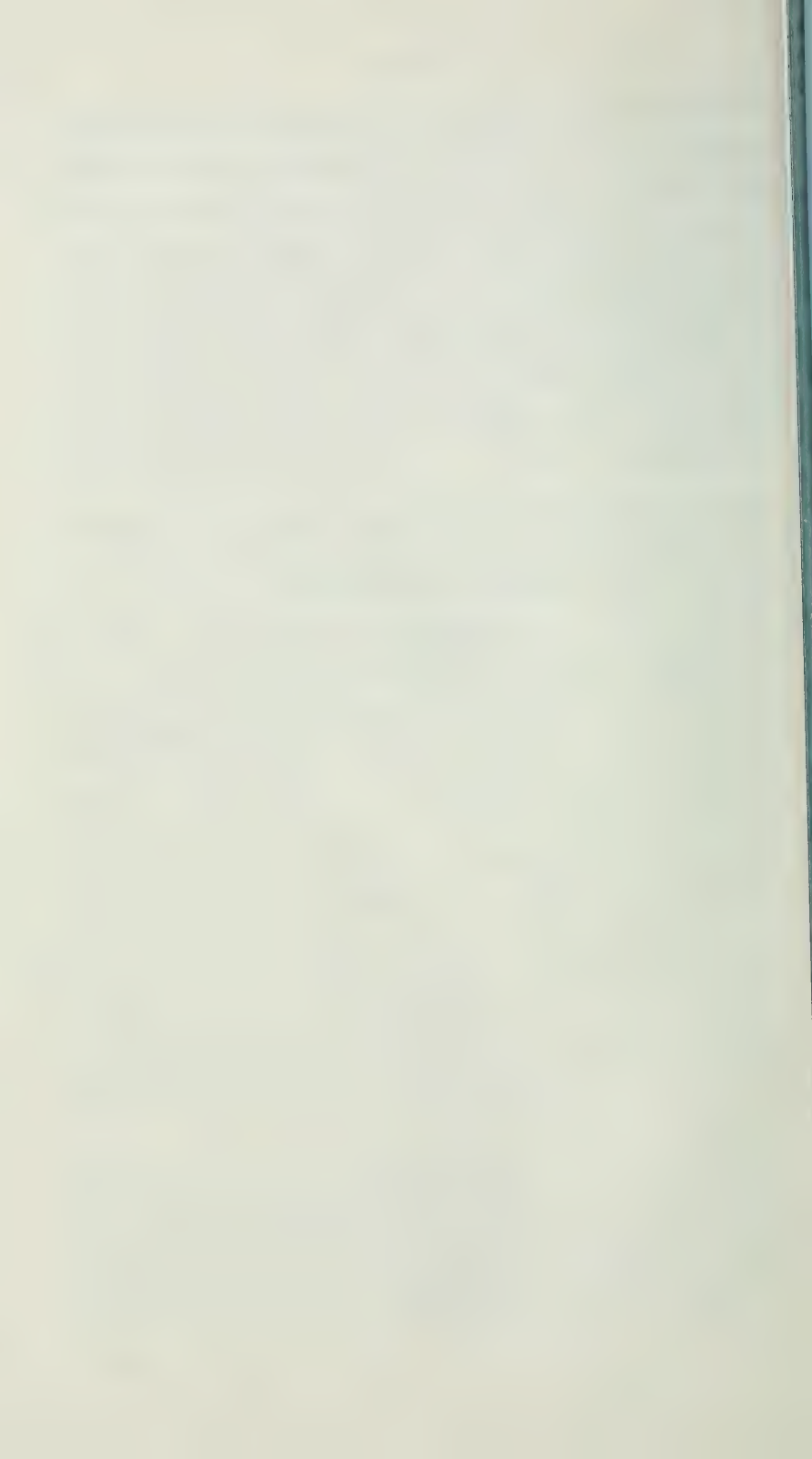
Dated: This 26th day of June, 1950.

Respectfully submitted,

GENDEL & RASKOFF,

By H. MILES RASKOFF,

Attorneys for Appellant.



APPENDIX.

3 *Collier on Bankruptcy*, 14th Ed., §57d. The Judicial Act of Allowance, Disallowance, Postponement or Subordination; §2a(2).

* * * * *

“Allowance and disallowance are judicial acts. Jurisdiction to allow and disallow is based on §2a(2); and the jurisdiction of the bankruptcy court in this respect is exclusive of all other courts. In passing on an allowance of claims the court sits as a court of equity, which gives it far-reaching powers ‘to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.’ Mere reasons of equity may sometimes require that a creditor’s claim be either totally disallowed or subordinated to the claims of all or of certain other general creditors, such as where the creditor is closely related to the bankrupt, or as a majority stockholder or corporate officer should be treated as a proprietor rather than as a creditor, or where by some previous conduct he is estopped to claim parity with other creditors.” (p. 185.)

3 *Collier on Bankruptcy*, 14th Ed., Ch. 63.08. Subordination or Postponement of Claims.

“As mentioned in §§63.06 and 63.07, *supra*, in connection with certain equitable defenses, a claim may be provable and on principle also allowable, and yet due to circumstances surrounding its origin it may appear unfair to allow the claim to compete with those of other creditors on a footing of equal-

ity. The claimant's conduct may have been the direct or indirect cause for other creditors to change their position, or may warrant the inference that his investment, though legally a credit, was economically more in the nature of a partnership or similar commercial venture more or less identifying the claimant with the bankrupt, or it may be tainted with some degree of fraud, deceit or other objectionable practice. Under these and comparable circumstances, the claimant should not, through a straight allowance, be permitted to increase the loss already suffered by other creditors while on the other hand the facts may not be sufficient to justify complete disallowance. The compromise as worked out by judicial practice is a mode of relative disallowance, the judge-made counterpart to the priorities provided by the Act, and is usually called 'postponement' or 'subordination.' It is one of the valuable contributions of equity to the body of statutory bankruptcy law." (pp. 1809-1810.)

6 *Remington on Bankruptcy*, 477. Postponing Dividends of Some Creditors to Others Because of Equities.

"§2875. Postponing Dividends of Some Creditors to Others Because of Equities. Under the power of the court to adjust the equities existing among general creditors, it has been held that the claims of creditors, who, though not guilty of preferences avoidable under the peculiar provisions of the Bank-

ruptcy Act have yet been guilty of conduct which, under the ordinary rules of equity, would make it inequitable for them to share in the dividends on an equality with other creditors, may be postponed to the claims of other creditors in the distribution of dividends.” (p. 477.)

1947 Supplement to Volume 6, Remington on Bankruptcy, continuing on Section 2875, at page 138:

“Subordination is a means of regulating distribution results in bankruptcy by adjusting the order of creditors’ payments to the equitable levels of their comparative claim positions. Its fundamental aim is to undo or to offset any inequity in the claim position of a creditor that will produce injustice or unfairness to other creditors in terms of bankruptcy results. Its most common uses are to nullify any fraud that a creditor has committed and to prevent unjust enrichment in a fiduciary relation.”



No. 12498.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, as Receiver of the Estate of Salsbury
Motors, Inc., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSO-
CIATION,

Appellee.

APPELLEE'S BRIEF.

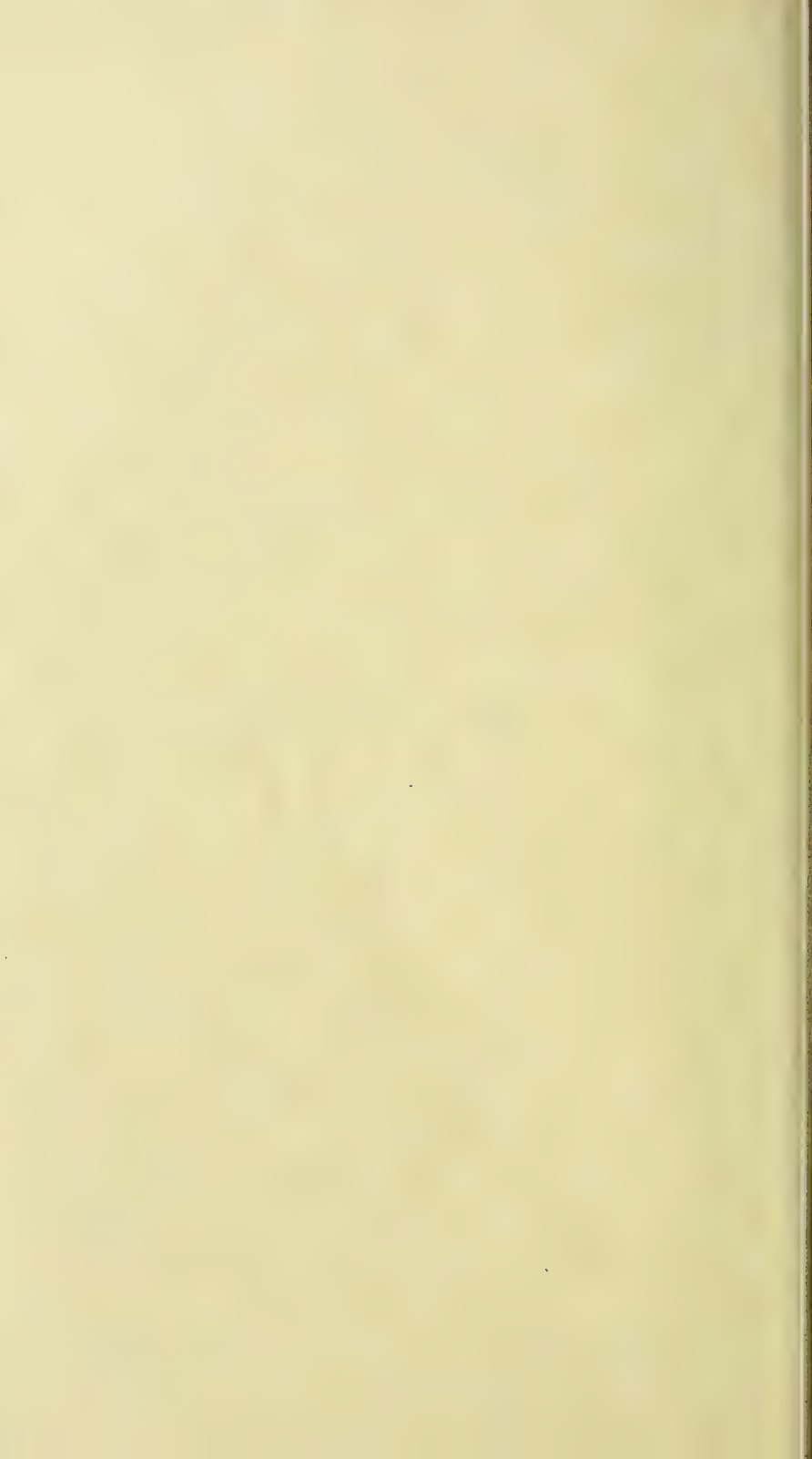
SAMUEL B. STEWART, JR.

HUGO A. STEINMEYER

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650 South Spring Street, Los Angeles 14,

Attorneys for Appellee.



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IN THE

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Motors, Inc., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSO-
CIATION,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

On August 20, 1947, Salsbury Motors, Inc., the debtor in this proceeding, filed a petition for approval of a plan of arrangement under Chapter XI of the Bankruptcy Act (11 U. S. C., Sec. 701, *et seq.*) [R. 2-8]. The debtor remained in possession for a short while and thereafter Geo. T. Goggin, Appellant herein, was appointed Receiver. The Receiver operated the business for a short time, and on July 30, 1948, the Referee signed an order confirming the debtor's second amended plan of arrangement, which provided for the payment by the debtor of a specified sum to be used to pay the expenses of administration and the creditors' claims, the debtor to receive all of its assets free and clear of liens [R. 29-31].

The Appellee Bank of America National Trust and Savings Association, hereinafter called the Bank, filed its claim in these proceedings for the sum of \$601,482.80, to which the Receiver filed objections. These objections, after trial on the merits, were overruled and an order was made and entered on March 22, 1948, allowing the Bank's claim [R. 166-179]. This order contained an express finding that the Bank was entitled to participate as an unsecured creditor in all dividends paid on unsecured claims, and it was ordered that the Bank "shall be entitled to dividends upon the said claim at the same rate paid to unsecured creditors * * *" [R. 178-179]. The Receiver petitioned for a review of this order, and after the Referee's order was confirmed by the District Court, the Receiver appealed. On June 23, 1950, in case No. 12206, this Court handed down its affirming decision. This phase of the case is referred to by Appellant as the "Banker's Lien" litigation.

Upon confirmation of the plan of arrangement on July 30, 1948, the Receiver instigated the present proceeding by filing a petition with the Referee, seeking, on equitable grounds, to subordinate the claim of the Bank to the claims of all other creditors so as to deprive the Bank of the dividends to which it was entitled under the order referred to above [R. 58-62]. On January 20, 1949, some six months later, the Receiver filed a supplement to this petition [R. 63]. At the hearing the Bank objected to the jurisdiction of the Court to hear the controversy

and to the sufficiency of the petition and supplement [R. 79-81]. The objections of the Bank were sustained and the petition denied by the Referee by an order entered March 19, 1949 [R. 83]. The Receiver petitioned for review of this order, and after hearing, the District Court on January 20, 1950, entered an order affirming the order of the Referee and denying the Receiver's petition for review [R. 150-152]. The Receiver then took this appeal [R. 152-153].

Since the substance of the Receiver's petition and supplement and the pertinent provisions of the plan of arrangement and the order confirming it are fully set forth in the arguments in both briefs they will not be repeated here.

Questions Presented.

1. Whether the Referee and the District Court were correct in concluding that the Bankruptcy Court had not retained jurisdiction to hear and determine the issues attempted to be raised by the Receiver's petition and supplement.
2. Whether the Referee and the District Court were correct in concluding that the Receiver's petition and supplement did not state facts sufficient to require subordination of the Bank's claim.
3. Whether the Referee and the District Court were correct in concluding that the Receiver had no power or authority to prosecute the proceedings initiated by the petition and supplement.

Summary of Argument.

1. The Bankruptcy Court had no jurisdiction to entertain the Receiver's petition and to grant the relief sought therein.

a. Since the question of the allowance of the Bank's claim and the Bank's right to dividends thereon had been decided and was on appeal at the time of the hearing on this petition, the Referee and the District Court were correct in holding that they were without jurisdiction to hear and determine the issues raised by the petition.

b. Neither the plan of arrangement nor the order of confirmation contained a reservation of jurisdiction to determine the issues raised by the Receiver's petition and supplement thereto.

2. The petition and supplement thereto fail to allege facts sufficient to warrant the granting of the relief prayed for.

a. The Receiver had no right, power, authority or duty to initiate the petition seeking subordination.

b. The allegations in the petition and supplement thereto, even if assumed to be true, are not sufficient to warrant subordination of the Bank's claim to those of all creditors.

3. Since neither the Referee nor the District Court made any order either granting or refusing to grant leave to the Receiver to file an amended petition, there was no abuse of discretion in this respect by either the Referee or the District Court.

ARGUMENT.

I.

The Bankruptcy Court Had No Jurisdiction to Entertain the Receiver's Petition and to Grant the Relief Sought Therein.

- (a) Since the Question of the Allowance of the Bank's Claim and the Bank's Right to Dividends Thereon Had Been Decided and Was on Appeal at the Time of the Hearing on This Petition, the Referee and the District Court Were Correct in Holding That They Were Without Jurisdiction to Hear and Determine the Issues Raised by the Petition.

As set forth in the statement of the case, the Receiver duly filed objections to the allowance of the Bank's claim [R. 20]. After full hearing in which the Receiver had every opportunity to raise all conceivable objections to the allowance, the objections were overruled by the Referee. The Receiver sought review of that order by the District Court [R. Case No. 12206, p. 93], and upon affirmance, on February 1, 1949, filed notice of appeal to this Court [R. Case No. 12206, p. 111]. The appeal was docketed in this Court on March 11, 1949, and the decision of this court affirming the District Court's decision announced on June 23, 1950. The Receiver has obtained a stay of mandate indicating his intention to petition the Supreme Court of the United States to grant certiorari.

The instant matter first came on for hearing before the Referee on March 2, 1949, about one month after the filing of the notice of appeal in the litigation referred to above. The Referee's order appealed from in this case was entered March 19, 1949 [R. 83]. The District Court's order was entered January 20, 1950, approxi-

mately nine months after the appeal in Case Number 12206 had been perfected [R. 150].

It is fundamental that the District Court and the Referee lose jurisdiction over a matter when an appeal is perfected to this Court. *Rothschild & Co. v. Marshall*, 51 F. 2d 897, 899 (C. C. A. 9, 1931). The only question is whether the contentions asserted by counsel for the Receiver in his petition here on review constituted objections to the allowance of the Bank's claim which were disposed of in Case Number 12206. We think they did.

The text writers and the cases provide ample support for the proposition that the Bankruptcy Court's power to subordinate claims or postpone the payment of dividends thereon constitutes an exercise, to a lesser degree, of its power to disallow claims entirely. Subordination is merely a means of accomplishing equity where the circumstances presented in objection to a claim are such that the severe penalty of complete disallowance should not be imposed.

The cases cited and relied upon by Appellant support this analysis. In *Manufacturer's Trust Co. v. Becker* (1949), 338 U. S. 304, 94 L. Ed. 99, 70 S. Ct. 127, the Supreme Court said (p. 309, fn. 7):

Since the power of disallowance of claims, conferred on the bankruptcy court by §2 of the Act, 30 Stat. 545, 11 U. S. C., Sec. 11, embraces the rejection of claims "in whole or in part, according to the equities of the case" (*Pepper v. Litton*, 308 U. S. 295, 304-305 (1939)), the court may undoubtedly require limitation of the amount of claims in view of equitable considerations . . .

Professor Collier characterizes subordination as “relative disallowance” of a claim, saying (3 Collier, Bankruptcy, 14th Ed., Chap. 63.08, pp. 1809-1810):

The compromise as worked out by judicial practice is a mode of relative disallowance, the judge-made counterpart to the priorities provided by the act, and is usually called “postponement” or “subordination.” It is one of the valuable contributions of equity to the body of statutory bankruptcy law.

Since the Bank’s claim had already been allowed in full when this petition was brought, it cannot by a subsequent order, collaterally attacking the allowance, be “relatively disallowed.”

The test would seem to be whether the order of March 22, 1948, allowing the Bank’s claim decided the question of parity. If it did, the lower court properly held that it had no jurisdiction to entertain this petition. While it is true that the grounds for subordination here urged by counsel for the Receiver were not raised by him at the time he objected to the Bank’s claim, they should have been urged at that time (and undoubtedly would have been) if they had any substantial merit. To allow the Receiver to file and prosecute objections to the allowance of the Bank’s claim, and, later, when he finds the objections overruled, on second thought to raise further objections in the form of a petition for subordination is to subject the claimant to undue harassment, and to give the Receiver two opportunities to accomplish the same result, *viz.*: practical disallowance of the Bank’s claim.

It is significant that the Referee concluded as a matter of law in the order allowing the Bank's claim that the

“Claimant is entitled to participate as an unsecured creditor in all dividends paid upon unsecured claims for the balance of its claim as so determined.” [R. 178.]

and it was ordered that

* * * the claim of Bank of America National Trust and Savings Association filed herein is hereby allowed in the sum of \$601,482.80. * * * It is further ordered that said claimant *shall be entitled to dividends upon the said claim at the same rate paid to unsecured creditors.* [R. 178.] (Emphasis ours.)

It is submitted that an order such as the one requested by the Receiver in his petition to subordinate in this case is completely inconsistent with the above quoted order that the “claimant shall be entitled to dividends upon the said claim” and the finding that “claimant is entitled to participate as an unsecured creditor in all dividends paid upon unsecured claims.” Certainly the plain intendment of the finding was to permit the Bank to participate as an unsecured creditor on a parity with and at the same rate as the other creditors. A subordinated claimant cannot possibly “be entitled to dividends upon the said claim at the same rate paid to unsecured creditors.” The Receiver is now in the position of arguing that the Bank is not entitled to dividends at the same rate as other creditors, but at a rate of zero until all other creditors are paid. This position is not in the least compatible with the order allowing the Bank's claim.

The conclusion is inescapable from the foregoing that the subject matter of the instant petition was embraced in and the issue decided in the other proceeding which was on appeal at the time the Referee and the District Court decided they did not have jurisdiction to entertain this proceeding.

In his brief at page 19 the Receiver says he is "seeking to defer any payment of dividends on the Bank's claim until the claims of other creditors have been paid." In his petition the Receiver seeks a ruling that the Bank "not participate in any dividends from the said \$75,000 until all other creditors are paid in full." [R. 65.] Such relief, if granted, would certainly deprive the Bank of its right under the existing unchallengeable order to "be entitled to dividends upon the said claim at the same rate paid to unsecured creditors."

The order allowing the Bank's claim went further than mere allowance, and, by necessary implication determined the Bank's right to a dividend on a parity with other creditors. Unless the Supreme Court of the United States grants certiorari and reverses the existing decision of this Court, the Receiver is foreclosed from attempting to deprive the Bank of its established right to dividends at the same rate as other creditors. He should not be permitted to attack the validity of the previous order collaterally under the guise of a petition to subordinate.

The trial court was therefore clearly correct in sustaining the Bank's jurisdictional objection in this case on the ground that the issues raised by the petition were then pending for decision in the Court of Appeals.

(b) **Neither the Plan of Arrangement nor the Order of Confirmation Contained a Reservation of Jurisdiction to Hear and Determine the Issues Raised by Receiver's Petition and Supplement Thereto; in the Absence of Such a Reservation the Court Had No Jurisdiction.**

Section 367 of the Bankruptcy Act (11 U. S. C., Sec. 767) provides that upon confirmation of an arrangement and the payment of costs and expenses and disbursement of the consideration provided by the plan, the case shall be dismissed "except as otherwise provided in Sections 369 and 370 of this Act."

Section 368 (11 U. S. C., Sec. 768) provides that the Court shall retain jurisdiction of the proceedings if so provided in the arrangement. Section 369 (11 U. S. C., Sec. 769) provides that the Court shall in any event retain jurisdiction until the final allowance or disallowance of all debts affected by the arrangement, and Section 370 (11 U. S. C., Sec. 670) provides that upon the allowance of debts which have been disputed the consideration shall be disbursed.

It is clear that under these provisions of the statute we must look to the order confirming the second amended plan of arrangement to determine what jurisdiction was reserved by the Court at that time [R. 40-44]. *In re Gordon*, 44 Fed. Supp. 581, 582 (D. C., N. D., N. Y., 1941). The only reservation of jurisdiction contained in the order confirming the plan is as follows [R. 43]:

IT IS FURTHER ORDERED that this court retains and reserves jurisdiction to determine the amount and validity of all claims of creditors, both secured and unsecured and the classification of said claims, and all objections that have heretofore been made or

that may be made in regard thereto, with a like effect and power as if the above-named debtor had been adjudged a bankrupt and George T. Goggin were the acting trustee in bankruptcy; and that George T. Goggin, as receiver and disbursing agent, shall have the right to object to any and all claims with like effect as if he were acting in the capacity of a trustee in bankruptcy.

This order clearly does not contain a reservation of jurisdiction to hear the present controversy. The only jurisdiction reserved is the jurisdiction to determine objections to claims. If the Receiver's petition is considered as an objection to the claim of the Bank, then conceivably the Court might have had jurisdiction to hear it except for the pendency of the appeal from the order allowing the claim, but Counsel, in an attempt to avoid the dilemma in which he finds himself argues (Br. pp. 19-20) that the Receiver's petition is not an objection to the claim. He cannot, therefore, successfully rely upon this provision of the order to support jurisdiction of the Court.

The Court also reserved jurisdiction in its order to determine "the classification of said claims." Counsel infers, apparently (Br. p. 26), that the matter here on appeal is a petition to classify the Bank's claim. But obviously this language was intended to do no more than reserve jurisdiction to determine into which of the specified classes of claims established by the plan a particular claim belonged. Article I of the plan contemplated classification of claims into classes A to D [R. 29-30]. The Receiver admits (Br. p. 21) that the Bank's claim fell within Class D, and no contention to the contrary has ever been made. There is no class denominated "subordi-

nated claims" contemplated by the plan. It is only by severely straining the plain intendment of the language that this reservation can be said to refer to anything else than the division of claims into Classes A, B, C and D.

The Receiver seeks to base the Court's jurisdiction upon the provision in the *plan of arrangement* that the Court should retain jurisdiction to pass upon all controversies with creditors and third persons with like effect as if there had been an adjudication in bankruptcy.

We think that this argument is untenable and not supported by the record. The controversy presented by the Receiver's petition in essence is not a controversy with a creditor. It is a controversy *between* creditors because the Receiver is attempting to assert that some creditors have an equitable right to receive dividends before dividends shall be paid upon the Bank's claim. The entire petition and supplement thereto are based apparently upon some theory that the Bank by continuing to extend credit to the debtor while insolvent, and by giving out credit information to prospective creditors, has estopped itself, in so far as those creditors who relied upon such information are concerned, to participate in dividends with them on a parity. Assuming that these facts are true, they would, at most, give rise to a cause of action against the Bank in the individual creditors who relied upon the credit information. The issue remains a controversy between creditors, even though instigated by the Receiver who in an excess of zeal has assumed the role of special representative of one group of creditors seeking an advantage over another. There is no reservation of jurisdiction to determine such controversies *between* creditors.

It is significant that the consents of the individual creditors to the plan [R. 57] contained an express reservation that

This consent * * * shall not in any manner prejudice the rights, defenses or cause of action that the undersigned, as a creditor, would have * * * or any creditor of Salsbury Motors, Inc., would have in the event that Salsbury Motors, Inc., were adjudged a bankrupt * * *

And the plan itself provided [Article IV, R. 48] that:

There shall remain vested in the creditors, such rights of actions and claims as they may have at this time against parties other than the debtors, exclusive of the matters settled and compromised in Article V herein, without limiting any of the foregoing provisions contained in this Article, the order confirming the second amended plan of arrangement and the acceptance by creditors of the same, shall be without prejudice as to the rights of creditors, receiver, his successor in interest, or the bankrupt estate, in connection with any and all proceedings or claims existing or now pending or that may be instituted against any person or corporation, except the rights, claims and demands settled and compromised under Article V herein.

It is abundantly clear from the foregoing that the creditors retained all causes of action not expressly foreclosed by their consents and adoption of the plan. There was no submission of these causes of action to the jurisdiction of the Bankruptcy Court. On the contrary, the plain intention of the creditors was to preserve their relative legal positions among themselves in *status quo*. There is nothing in the consents, the plan or the order of confirmation indicating any intention on anyone's part

that the Court should assume jurisdiction to litigate causes of action vested in the individual creditors. On the contrary the express retention of rights indicates a clear intent that the creditors are to remain free to prosecute such causes of action as they may have in a forum of their own choosing. There is an express negation of any desire on their part that the Receiver usurp and prosecute their causes of action for them as a sort of informal "next friend."

Notwithstanding the assertions and intimations of counsel to the contrary (Br. p. 22), the plan of arrangement did *not* provide either that the claim of the Bank should be subordinated to that of other creditors or that the Receiver should initiate proceedings to that end. The most that can be said on that score is that there was a provision in Article V(c) of the second amended plan [R. 51-52] to the effect that the controversies then pending between the Receiver and Northrop Aircraft Corporation, settled by the plan, should not be affected as a result of any subordination of the claim of the Bank to the claims of other creditors. This limitation, however, related only to the Receiver's compromise with Northrop Aircraft Corporation and did not apply to any other controversy.

Counsel relies heavily upon the fact that the plan of arrangement provided in Article IV that there remain vested in George T. Goggin, as Receiver and disbursing agent, all causes of action that could or would vest in George T. Goggin as Trustee in the event of an adjudication, with full right and power to prosecute any such action or causes of action that would vest in him as a Trustee in Bankruptcy (Br. pp. 22-26). This provision, however, makes no reference to *jurisdiction of the Bankruptcy Court*

to entertain such actions or proceedings by the Receiver, and neither does the order of confirmation [R. 40-44].

We have fully discussed the provisions of both the plan and the order pertaining to jurisdiction because of counsel's apparent contention that in some manner a reservation of jurisdiction can be accomplished merely by including it in the plan. We think, however, that the law is clear that the extent of the jurisdiction of the Court must be determined by the provisions of the order confirming the plan and *the jurisdiction reserved by that order*. This is the effect of Sections 367, 368 and 369 of the Bankruptcy Act above referred to and the interpretation placed upon those sections by decisions of the Courts.

The order confirming the second amended plan of arrangement was a judgment from which an appeal would lie. (Bankruptcy Act, Secs. 39(c), 24. Rule 54a, Federal Rules of Civil Procedure.)

If the order failed to reserve jurisdiction in the manner contemplated by the plan of arrangement, any creditor interested might have prosecuted an appeal therefrom. In the absence of such an appeal, the order became final and the jurisdiction must be determined by its provisions. This very point was decided in *Prudence Realization Corp. v. Ferris*, 323 U. S. 650, 654, 89 L. Ed. 528, 533, in which the Supreme Court said:

This case is not the Geist Case. Here the bankruptcy court neither considered the question of parity nor retained jurisdiction to consider it. *The order of confirmation contained no provision for retention of jurisdiction to decide the parity question* as did the Geist order. Nor did the closing of the reorganiza-

tion reserve jurisdiction, as did the Geist closing order. The provisions for disposition of the impounded funds in case subordination be determined are much more elaborate than the Geist Case discloses. In short, while the provisions for adjudication of the parity question in the Geist Case clearly contemplated determination of it as part of the reorganization proceedings by the Bankruptcy Court itself, in the present case the Bankruptcy Court washed its hands of the problem and left the parties to litigate the question in another forum. For it is not questioned that the state court was a "Court of competent jurisdiction" for adjudicating the claim of parity.

To be sure, the Securities and Exchange Commission as *amicus curiae*, suggests that the Bankruptcy Court was in error in failing to retain jurisdiction for determining this aspect of distribution. But the different treatment of the same problem by the same court in the Geist Case and in this, together with acquiescence by the petitioner in the closing order without seeking a review of the nonretention of jurisdiction, give ground for believing that the arrangement was the product of bargaining between the parties. *In any event, since no appeal was taken, it is not now open to find error by the Bankruptcy Court in failing to retain jurisdiction.* The order confirming the plan or reorganization is *res judicata*. [Emphasis ours.]

Appellant makes the bald assertion (Br. p. 32) that "in the instant case it was definitely contemplated that any subordination of claims should be a part of the proceedings to be conducted by the Bankruptcy Court, and that the *Ferris* case, *supra*, is therefore not controlling. But we look in vain for any language in the plan or the order

to support counsel's assertion. We find, instead, an express reservation to the creditors of their causes of action, and an expression that the plan and the order of confirmation should be without prejudice to such rights. Clearly, the rules announced in the *Ferris* case are applicable here.

In *In re Wedgewood Hotel Co.*, 125 F. 2d 327 (C. C. A. 7, 1942), the petitioner, a creditor, sought to have the Court order the trustee under a Section 77b proceeding to accept certain provisions of a trust agreement drawn in accordance with the petitioner's interpretation of the plan of reorganization. The order confirming the plan of reorganization stated:

The Court reserves jurisdiction herein to enter such further orders as may hereafter be deemed necessary or proper in connection with carrying out the terms and provisions of the plan of reorganization as amended, and terminating this cause.

The Court said at page 329:

Admittedly, the relief sought in the instant petition is foreign to the matter over which the court expressly reserved jurisdiction; that is, disputes relative to the ownership of first mortgage bonds and the issuance of new securities therefor. It is plain that there is nothing in the final decree by which the court expressly retained jurisdiction over the subject matter of the petition. We do not understand petitioner to controvert this appraisal of the final decree, but it is contended the court has an implied or inherent jurisdiction to enforce its final decree and to aid in carrying out the plan. Assuming such to be the law, it affords no support to petitioner for the reason that the relief sought was foreign to, and in contravention of, the plan of reorganization as assented to by

the creditors and approved by the court. In fact, the petition plainly discloses that another and different plan of reorganization was proposed. If consummated, the result would be a new plan of reorganization, not assented to by the creditors, superimposed upon the plan, assented to and confirmed.

This decision is directly applicable to the facts here. The plan of arrangement did not provide for a subordination of the Bank's claim. The Receiver in effect is arguing that the Court must have retained jurisdiction to superimpose a different plan from that which was confirmed, namely, to direct a plan in which the Bank's claim would be subordinated to the claims of other creditors.

In the case of *In re East Boston Coal Co.* (D. C. Pa.), 47 Fed. Supp. 593, the Court said:

It is clear that it is contemplated by this section [Section 224(2), 11 U. S. C., Sec. 624(2)] that the Court shall retain jurisdiction of the debtor until consummation of the plan of reorganization in order to insure that the provisions of the plan of reorganization are carried out. [Citations.] However, *there is nothing in the Bankruptcy Act to indicate that the Court retains jurisdiction of the debtor for the purpose of disposing of any controversy which might arise between the debtor and third parties relating to matters other than the plan of reorganization itself.*

* * *

However, in view of the fact that the petition reveals on its face that the controversy is not one which arises under the provisions of the plan of reorganization, and, as I have stated, that this Court is without jurisdiction to determine the matter therein referred

to, I will dismiss the petition at this time rather than delay the final determination of the matter until a further hearing is had. [Emphasis ours.]

It is true that the foregoing cases involve proceedings for reorganization under Chapter X of the Bankruptcy Act rather than Chapter XI. But the provisions and the objectives of the two chapters are so similar that these decisions may be said to be controlling. In an attempt to distinguish these cases, Counsel argues (Br. pp. 32-33) that the Bankruptcy Court has more jurisdiction during the interval between the confirmation of the plan and the final order discharging the Receiver. It is true that there are certain tasks to perform during the interval for which jurisdiction is conferred by the statute. (See *e.g.* 11 U. S. C., Sec. 769.) But we have found no authority for the proposition that the Bankruptcy Court has a general reservoir of jurisdiction upon which it can draw during the interval but which is exhausted by the final order closing the estate.

In *In re Gordon*, 44 Fed. Supp. 581 (D. C. S. D., N. Y. 1942), the court discussed this question and said (p. 582):

Where by the arrangement jurisdiction is not retained there is nothing between "dismissal" and "closing the estate" except the exercise of the powers conferred by Sections 369 and 370.

The Receiver apparently argues (Br. pp. 34-35) that the Court below had an "inherent" jurisdiction to entertain and decide the issues raised by the petition as a part

of its power to order distribution of funds on hand. But the Bankruptcy Court is a statutory court which has only such jurisdiction as is granted to it by Congress. The Receiver seeks comfort in Section 369 of the Bankruptcy Act (11 U. S. C., Sec. 769), but it is clear that the present controversy does not fall within that section. Section 369 constitutes merely a retention of jurisdiction until the final allowance or disallowance of all debts which have been proved, but not allowed or disallowed or are disputed or unliquidated. The claim of the Bank in the instant proceeding had been proved and allowed before the instant petition was filed. This section, like the express reservation in the order of confirmation, relates only to the allowance or disallowance of claims. It cannot be stretched to include the determination of a controversy between creditors such as this.

In the *Gordon* case, *supra*, the debtor, after confirmation of an arrangement under Chapter XI and after default in his obligations under the plan, sought to compel distribution of the funds in the hands of the distributing agent. The Court said (p. 582):

These two sections [357(7), 368] of the Bankruptcy Act bestow upon the parties to an arrangement the option whether to continue the court's jurisdiction or not (except in the respects hereinafter mentioned). The choice has important and specific significance. If it is in favor of continuing jurisdiction it brings into play the provisions of section 377 which, in the event of default in performance of the terms of an arrangement, permit an adjudication in bank-

ruptcy if the proceeding is brought under section 322, and compel such an adjudication if the proceeding is brought under section 321. Retention of jurisdiction also makes section 344 operative after confirmation.

The arrangement under consideration did not provide for the retention of jurisdiction. The plain implication from sections 357(7) and 368 is that *where provision for retention is not made in the arrangement the court is without jurisdiction except as the statute otherwise directs.* * * *

It is my conclusion that the debtor's dilemma cannot be solved by the instant application; that the Bankruptcy Act does not provide judicial supervision over post confirmation claims and post confirmation conduct where jurisdiction is not retained in the court by the arrangement; and, therefore, that the petition must be dismissed. [Emphasis ours.]

In summary on this point, therefore, we respectfully submit that, first, the order of confirmation does not reserve jurisdiction; second, the amended plan of arrangement did not contemplate reservation of jurisdiction for this purpose; third, the plan and the consents thereto contained a clear expression of intention to reserve to the consenting creditors any causes of action they might have; and fourth, notwithstanding the terms of the plan, the order of confirmation is controlling, and if it did not conform to the plan an appeal should have been taken. We respectfully submit that the Court below correctly determined that it had no jurisdiction to hear the allegations of the Receiver's petition and supplement thereto.

II.

The Petition and Supplement Thereto Fail to Allege Facts Sufficient to Warrant the Granting of the Relief Prayed for.

(a) The Receiver Had No Right, Power or Authority to Initiate the Current Proceedings.

It is the Appellee's position, supported by the record and by the authorities, that the Receiver himself had no authority to initiate these proceedings because the order of confirmation of the plan does not grant him such authority, and because the subject matter of the petition is not properly the basis of a cause of action in a receiver, a disbursing agent or a trustee.

The only reservation of authority to George T. Goggin as Receiver and disbursing agent is the following excerpt from the confirmation order :

and that George T. Goggin, as Receiver and disbursing agent, shall have the right to object to any and all claims with like effect as if he were acting in the capacity of a trustee in bankruptcy. [R. 43].

Counsel for the Receiver is here faced with a dilemma similar to the one heretofore discussed. If the petition of the Receiver constitutes an objection to the Bank's claim, the Receiver might conceivably have the power and authority to prosecute it, but, as we have previously pointed out, the Court would have no jurisdiction to hear such objections while the appeal is pending. On the other hand, if the Receiver's petition does not constitute an objection to the Bank's claim, there is no power or authority reserved to the Receiver to prosecute it in any event.

Here again the assertion is made by the Receiver that he has authority because the plan provided that there re-

main vested in George T. Goggin, as Receiver and disbursing agent, all causes of action that could or would vest in Goggin as Trustee in Bankruptcy in the event that he were appointed as such (Br. pp. 38, *et seq.*). The plan of arrangement in Article IV, however, also provides that "*there shall remain vested in the creditors* such rights of action and claims as they may have at this time against parties other than the debtor exclusive of the matters settled and compromised in Article V herein." (The reference to Article V is to a controversy with Northrop Aircraft Corporation) [R. 48].

The plan itself thus contemplated that there might be rights or causes of action in favor of creditors which would not be vested in a trustee in bankruptcy in the event that a trustee should be appointed. The plan expressly provided that those rights which might become vested in a trustee in bankruptcy would remain vested in Goggin, and those rights of creditors against parties other than the debtor (which, of course, would include the Bank) should remain vested in the creditors themselves. It cannot seriously be argued that the plan of arrangement contemplated that George T. Goggin, by virtue of his office as Receiver and disbursing agent, should have the power or authority to initiate proceedings seeking to exercise rights which, by their very nature, exist only between certain creditors or between certain creditors and third persons.

It is further to be noted that the subject matter of the Receiver's petition is not properly the basis of a cause of action or proceeding by a receiver, a disbursing agent or a trustee in bankruptcy. The petition asserts generally that for equitable reasons the claim of the Bank should be subordinated to the claims of other creditors, and the alleged basis for this assertion is the contention that rep-

representations as to the financial condition of the debtor were made by the Bank to certain creditors.

If we assume for the moment that in a proper case such facts might constitute basis for relief to one or more creditors who could establish that they themselves were individually misled to their prejudice by some action or non-action of the Bank, it is apparent that such grounds for relief would be vested only in the creditors who were actually injured by the alleged misrepresentation. Clearly the trustee in bankruptcy, as a representative of *all* creditors, would have no right to assert any such cause of action. From its very nature the cause of action, if any, would exist only in the creditors who had been prejudiced.

This principle is demonstrated in the case of *Wallace v. Ohio Valley Bank*, 2 F. 2d 53 (C. C. A. 4, 1924), in which the Court said (p. 56):

Another of the trustee's exceptions goes to the entire claim of the bank. It alleges that the bank, for the purpose of getting undeserved credit for the bankrupt, knowingly made false statements as to the latter's financial condition, and that those to whom they were made acted upon them and suffered thereby. The trustee argues that in consequence the bank is not entitled to receive anything from the bankrupt estate until after its other creditors have been paid in full. To sustain this exception the trustee relies upon the telegram and the letter sent by the bank to Greenbaum, and as we understand the record upon them alone. *If they made the bank liable to any one, as to which we intimate no opinion, it was to Greenbaum. If anyone was deceived by them it was Greenbaum, and it alone suffered from them. The money the bankrupt obtained from it went to swell the bank-*

rupt's resources, and to a greater or less extent benefited the bankrupt's other creditors. As representing them, the trustee has not been hurt. Doubtless a case can be conceived in which a creditor of a debtor in failing circumstances may for its own purposes seek by knowingly false statements to obtain credit for the debtor from any or from all who may deal with the latter. Under such circumstances it may be that the trustee, as representing the creditors generally, has the right to insist that, in the distribution of the bankrupt's estate, the improper action of the one creditor shall estop it from competing with its victims; but such rule of law, *if it exists*, has no application to the instant case. The learned court below was right in overruling this exception. (Emphasis ours.)

The same ruling was made in the case of *J. Henry Schroder Banking Corporation, et al. v. L. S. Brach Mfg. Corp.*, 78 F. 2d 530 (C. C. A. 7, 1935), where the Court said (p. 532):

This note is held subject to an agreement dated as of April 9, 1931, between J. Henry Schroder Banking Corporation, Franklin-Washington Trust Company, and L. S. Brach Manufacturing Corporation.

Schroder's claim in bankruptcy was upon the \$30,000 note and for dividends to be paid in the bankruptcy proceedings upon the \$49,562.50 note to Brach, until the total amount of dividends received by it on both notes equaled \$30,000.

Schroder petitioned the court for an order directing the referee to pay dividends on the claim filed by Brach until its claim on the \$30,000 note and interest had been paid in full. Brach filed its answer objecting to the petition on the ground that the conflict

between it and Schroder was collateral to and not determinable in the bankruptcy proceedings. The trustee also objected to the Brach claim on the ground that the agreement between Brach and Schroder gave the latter preference in payments made thereon. *This action of the trustee was uncalled for and outside the scope of his duties.* [Emphasis ours.]

Counsel for the Receiver argues strenuously (Br. pp. 39-42) that a Bankruptcy Court has the general power and jurisdiction to subordinate the payment of dividends on claims as between creditors of the same class. We have no quarrel with the authorities on this point. As counsel has pointed out, we conceded before the lower courts that a Bankruptcy Court has the general power and jurisdiction in a pending bankruptcy proceeding to adjudicate such controversies. Our point is that *in this proceeding for an arrangement and under the order of confirmation entered by the Referee*, jurisdiction to determine such controversies has not been reserved, and under the statute and decisions the Court's general equity powers and general bankruptcy powers have been limited to the jurisdiction reserved by the order confirming the plan. We fail to see how the authorities cited by counsel on this point confer upon the Receiver any authority to prosecute a proceeding such as this.

There is a valid distinction between those cases where the inequitable conduct is of a type which, by its nature, must have affected *all* creditors who did business with the debtor, and those cases where the ground of subordination is founded upon contractual or other relations between *some* of the creditors only. Examples of the former type are founded upon the parent-subsidiary relationship,

and other cases in which a party with a fiduciary relationship to the debtor commits a breach constituting inequitable conduct prejudicial to *all* persons extending credit to the bankrupt. (See, *e.g.*, *In re Loewer's Gambirinus Brewery Co.*, 167 F. 2d 318 (C. C. A. 2, 1948).) In this type of case, the courts will, if the conduct is unconscionable, either disallow the claim or subordinate it, when objections to the allowance of claims are interposed by the trustees. But we have found no authority, and appellant has cited none, supporting the power of a trustee gratuitously to intermeddle between creditors, taking the part of one group of creditors against another where, as here, the alleged inequitable conduct arises from personal relations between them and does not affect those not parties to the transaction. Indeed, the cases hold that such matters are none of the trustee's business. *Wallace v. Ohio Valley Bank*, *supra*; *J. Henry Schroder Banking Corp. v. L. S. Brach Mfg. Corp.*, *supra*; see also *Equitable Holding Corp. v. Woody*, 63 F. 2d 751 (C. C. A. 2, 1933).

Matter of Bowman Hardware & Electric Co., 67 F. 2d 792 (C. C. A. 7, 1933), is an illustration of the proper method of raising the issue in this type of case. In that case the objection was interposed by a mercantile creditor on behalf of himself and others similarly situated. The Court held the conduct did not warrant subordination.

This court, in *Ingram v. Lehr*, 41 F. 2d 169, 170 (C. C. A. 9, 1930) indicated its doubt that a trustee can, on behalf of one creditor assert an objection to a claim on the ground that another creditor had acted inequitably toward him.

In summary upon this point, therefore, we respectfully submit that George T. Goggin, as Receiver and disbursing

agent, had no authority to initiate or prosecute his attempted petition for the reason that he was not granted any such authority by the order confirming the second amended plan of arrangement and for the further reason that even if he were a trustee in bankruptcy the alleged inequitable conduct is of such a nature that he would have no right or authority to initiate the proceeding.

(b) The Allegations in the Petition and Supplement Thereto, Even if Assumed to Be True, Are Not Sufficient to Warrant Subordination of the Bank's Claim to Those of All Creditors.

One of the points urged by the Bank before the Referee was that the facts alleged in the Receiver's original petition filed July 30, 1948 [R. 58], and the supplement thereto filed January 20, 1949 [R. 63] were insufficient as a matter of law to constitute any grounds for relief.

Counsel for the Receiver has attempted to make a point of the fact that during the argument on March 2, 1949, the Referee indicated that he would limit his order to jurisdictional grounds, and at a later time changed his mind and predicated it upon all of the grounds asserted by Appellee (Br. 45). We think it well to discuss this point and the matter of the amended petition before discussing the sufficiency of the petition on its merits. As we view it, no Court is bound by any colloquy with counsel during an argument on propositions of law. In any event, we think that the record shows that the Referee was of the opinion at the time of argument on March 2 that the Receiver's petition was insufficient [R. 158]. If it were possible to draft an amendment which would state a cause of action the Receiver could as well have done

that as to file a motion to reconsider, supported by a brief and subsequently followed by lengthy objections to the form of the order, without at any time making any proper application for leave to file an amended petition.

Counsel "strenuously urges" (Br. p. 45) that it was error for the courts below to refuse to grant the Receiver permission to amend his petition, and suggests in his statement of the case (Br. p. 7) that there was an abuse of discretion in such refusal. This argument is untenable for the simple reason that nowhere does the record show that either of the courts below made any order, either granting or refusing to grant leave to file the amended petition. There can be no abuse of discretion where there has been no exercise of discretion. At no time did counsel make a proper motion for leave to amend, or give any notice that he intended to make such a motion. From his tactics with reference to the proposed amendment, the inference is plain that Counsel was extremely reluctant to file it at all, and submitted it only after the Referee had announced his ruling. The amendment, having been filed on April 6, 1949, after the Referee's order here appealed from had been signed [R. 85, 107], is not properly a part of the record on this appeal. The District Court made no order with respect to the amendment at all, because there was no order with respect to it for him to review.

We believe that the Receiver's original petition and the supplement thereto do not state any grounds for equitable relief of any kind, let alone that prayed for by the Receiver, and that a consideration of the allegations of the petition and supplement leads inescapably to this conclusion.

We will review briefly the allegations of the original petition [R. 58] in order to indicate its utter lack of allegations sufficient to show any basis for equitable relief. Paragraph 2 alleges in substance that commencing in early 1946 the Bank received regular statements from the debtor showing that it was insolvent and losing money, that the debtor was in default, and the Bank continued to allow it to operate. Paragraph 3 alleges that the Bank knowingly and deliberately *permitted the debtor to continue in operation*, which caused a continued extension of credit by other creditors, and that the Bank, having withheld enforcement of its claims, is as a matter of law estopped from contending that it is entitled to dividends. Paragraph 4 alleges that as a matter of law the Bank by its conduct is estopped from participating on a parity with other creditors, and in Paragraph 5 it is alleged that the Bank, having lulled other creditors into a feeling of security by inducing their continued extension of credit, *caused by the Bank's failure to declare a default*, is not entitled to share until all other creditors are paid.

We think that we need not make an extended argument on the insufficiency of the original petition. A creditor's claim cannot be defeated even though the creditor extended the credit knowing of the insolvency, and, in fact, immediately prior to bankruptcy. The credit that is extended increases the value of a debtor's estate. It is inconceivable that anyone could argue with any degree of sincerity that because a creditor does not declare a default and throw a debtor into bankruptcy, even though he knows of his insolvency, the creditor is thereby to be deprived of a claim for his share of the assets of the bankrupt. The Receiver cites no cases supporting his

position in this respect, and, indeed, appears to have abandoned this ground entirely.

The original petition also alleges that the Bank was the only creditor that had notice that Northrop Aircraft Corporation did not intend to pay all of the debts of Salsbury Motors, Inc., and that therefore it would be inequitable to allow the Bank to participate in dividends payable from the \$75,000 collected from Northrop Aircraft Corporation in a compromise with the Receiver. We think that the answer to this assertion is found in the case of *William H. Moore, Jr., Trustee, etc. v. O. S. Bay*, 284 U. S. 4, 5, 76 L. Ed. 133, in which the Supreme Court said (p. 5):

The rights of the trustee by subrogation are to be enforced for the benefit of the estate. The Circuit Courts of Appeal seem generally to agree, as the language of the Bankruptcy Act appears to us to imply very plainly, that *what thus is recovered for the benefit of the estate is to be distributed in dividends of an equal percentum on all allowed claims, except such as have priority or are secured.* [Emphasis ours.]

It is fundamental that the recovery by the Receiver of the \$75,000 redounds to the benefit of the estate as a whole, and not to any particular group of creditors. The mere fact that the Bank in a separate action against Northrop might not have been able to recover is not a ground for depriving the Bank of its right to a dividend on its claim. The Receiver's theory, if adopted, would require the tracing of each asset in an estate to its particular source and a determination that each creditor claiming a dividend out of this asset could have recovered directly from the source of the assets. Such a cumber-

some requirement finds no support in the Bankruptcy Act or the cases.

The supplement to the petition of the Receiver contains additional allegations of the same character but equally without substance or merit. That document, dated January 20, 1949 [R. 63], alleges in substance that between January 1 and August 20, 1947, the Bank knew that Salsbury was insolvent and that it was unable to meet and pay its current obligations to the Bank, that Northrop Aircraft Corporation, the owner of the stock, would not pay or guarantee its obligations and had determined that it would not advance additional funds, and that Salsbury was not paying to unsecured creditors the current obligations as they became due.

If every individual who failed to pay his current obligations as they became due at one time or another was immediately thrown into bankruptcy, the Bankruptcy courts would be tremendously crowded. The idea that a creditor may be penalized by disallowance or subordination because he tolerates a default and gives the debtor an opportunity to work out of his difficulties is a novel one, and one that we are quite sure has not been given sanction by the courts.

The supplement to the petition further alleges that notwithstanding the knowledge of the Bank that the debtor was not paying its bills, the Bank, in response to credit inquiries of some persons who are creditors in the proceeding, and in response to inquiries from credit agencies, gave information that the financial condition of Salsbury was satisfactory and did not disclose that some obligations to the Bank were in default or had been extended or renewed, and did not disclose that the deed of trust held

by the Bank (which was recorded as required by law), secured all indebtedness of the debtor to the Bank. This document further alleges that certain unpaid creditors extended credit to the debtor in reliance upon the position taken by the Bank and the misinformation circulated by it in connection with the financial condition of the debtor.

Again, without any extended discussion, we respectfully submit that the allegations of the supplement to the petition are insufficient to constitute any basis for equitable relief. Such a petition, if it has any legal justification whatever, must be predicated upon allegations of facts which are legally sufficient to constitute fraud. The petition and supplement, however, are entirely lacking in such allegations. It is significant that in all of the allegations of the petition and supplement thereto the Receiver does not anywhere allege that any statement made by the Bank was untrue or that any specified creditor was in fact damaged by reliance upon any statement made by or attributed to the Bank.

For the convenience of the Court we quote briefly from the authorities on this point.

In the matter of *In re Bowman Hardware & Electric Co.*, 67 F. 2d 792 (C. C. A. 7, 1933), the court said (p. 794):

Before a general creditor's claim against the bankrupt may be disallowed or its status lowered, it must appear that said creditor has been guilty of some act involving moral turpitude or some breach of duty or some misrepresentation whereby other creditors were deceived *to their damage*. In the instant case the absence of any evidence showing that other creditors were damaged by appellant's action, conceding for the moment that such action amounted to fraud, is fatal

to the asserted priority of all other general creditors save Van Camp Hardware and Iron Company. * * *

The order of the District Court is reversed, with directions to allow appellant's claim on an equal footing with other unsecured creditors save only that the trustee shall pay to Van Camp Company out of appellant's distributive share a sum equal to the balance of Van Camp Company's claim, after deducting its dividend.

In the case of *Ingram v. Lehr*, 41 F. 2d 169 (C. C. A. 9, 1930), this Court said (p. 170):

Bankruptcy proceedings are in equity and undoubtedly a claim is subject to the general rule that "he who has done iniquity shall not have equity." But we do not find in the understanding here the quality of moral obliquity: it might have operated as a constructive fraud, but we do not think actual fraud was intended. To the contrary, it would seem that both parties were of the opinion that if the business could be carried forward by Hockinson he would be able to make a success of it and ultimately pay all of his debts, both those which then existed and those which he might incur. Assuming that hope or expectation to have been a reasonable one, the plan was not inherently fraudulent. Nor for the benefit of others contemplating giving Hockinson credit was the claimant under any legal obligation to make public the fact that Hockinson owed him. *Crowder v. Allen-West Comm. Co.* (C. C. A.), 213 F. 177, 183, 184. If subsequently, as there is some testimony tending to show, the claimant, by stating that he had no claim, affirmatively deceived one who was considering the matter of extending credit to Hockinson, the claimant might be estopped from asserting his claim *as against that creditor*. But even so, other creditors could not in-

voke the defense; the claim might still be provable against the estate and be good as against all other creditors. [Emphasis ours.]

And in the leading case of *Crowder v. Allen-West Commission Co.*, 213 Fed. 177 (C. C. A. 8, 1914), the Court said (p. 184):

A creditor must have been guilty of some moral turpitude or some breach of duty by which other creditors were deceived, to their damage, to constitute such a fraud as will estop him from sharing with them in the distribution of the proceeds of the estate of his debtor in bankruptcy. A willful intent to deceive or such gross negligence as is tantamount thereto is an essential element of such an estoppel.

A creditor of an insolvent debtor is a competitor of all his other creditors. *He stands in no fiduciary or contractual relation to them and owes them no duty to inform them of his debtor's financial condition, his insolvency, or of the amount of his indebtedness to him.* *Foster v. McAlester*, 114 Fed. 145, 151, 52 C.C.A. 107, 113. There was therefore no fraud or breach of duty in the failure of the commission company to inform the other creditors in this regard. [Emphasis ours.]

The Supreme Court of the United States in two recent cases has had occasion to review the doctrine of equitable subordination. In each of these cases, that Court has declined to subordinate or disallow the claims, indicating plainly that if the claim is the outgrowth of legitimate, good faith business transactions, neither in design nor effect producing injury, it will be allowed to participate. *Comstock v. Institutional Investors*, 335 U. S. 211, 230, 92 L. Ed. 1911, 1923 (1947); *Manufacturers Trust Co v. Becker*, 338 U. S. 304, 94 L. Ed. 99, 70 S. Ct. 127 (1949).

The Comstock case distinguished *Pepper v. Lytton*, 308 U. S. 295, and *Taylor v. Standard Gas & Electric Co.* (Deep Rock Case), 306 U. S. 307, cited by appellant, on their facts, but the dissenting opinion relied upon these cases. This clearly indicates that the Supreme Court intended to limit substantially the application of the subordination doctrine.

We fail to appreciate the "particular significance" of the case of *Columbia Gas & Electric Corporation v. U. S.* 151 F. 2d 461, reh. den. 153 F. 2d 101, cert. den. 329 U. S. 737 (C. A. A. 6, 1945) quoted at length by Appellant (Br. pp. 48-49), in view of the fact that the petition in this case contains no allegations of "illegal or inequitable conduct" similar to the conduct involved in the *Columbia* case.

Counsel in his conclusion (Br. pp. 50-51) implies that there is something reprehensible in the Bank's collecting as much of its debt as it was legally entitled to collect. Our only comment is that these remarks are wholly immaterial to the issues raised on this appeal, and insofar as they are based upon matters outside this record, are improper.

Conclusion.

It is submitted that the decision of the lower court was correct and should be affirmed. The Bankruptcy Court was without jurisdiction to hear and determine the issues raised by the Receiver's petition because (1) the same issues had already been decided adversely to the Receiver by a previous order which was then on appeal; (2) in a Chapter XI proceeding the Bankruptcy Court has only such jurisdiction as is reserved in accordance with the applicable statute, and in this case

there was no reservation of jurisdiction to decide the issues raised in the petition in either the plan of arrangement or the order of confirmation; and (3) the issues raised by the petition do not fall within any of the statutory reservations of jurisdiction. The Receiver in this case had no power or authority to initiate these proceedings. The petition and supplement thereto do not allege facts sufficient to warrant the subordination of the Bank's claim to that of all other creditors. The lower court did not exercise any discretion with respect to the amended petition and there could not, therefore, have been any abuse of discretion with respect to it.

Respectfully submitted,

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No. 12498.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, as Receiver of the Estate of
SALSBURY MOTORS, INC., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSO-
CIATION,

Appellee.

APPELLANT'S REPLY BRIEF.

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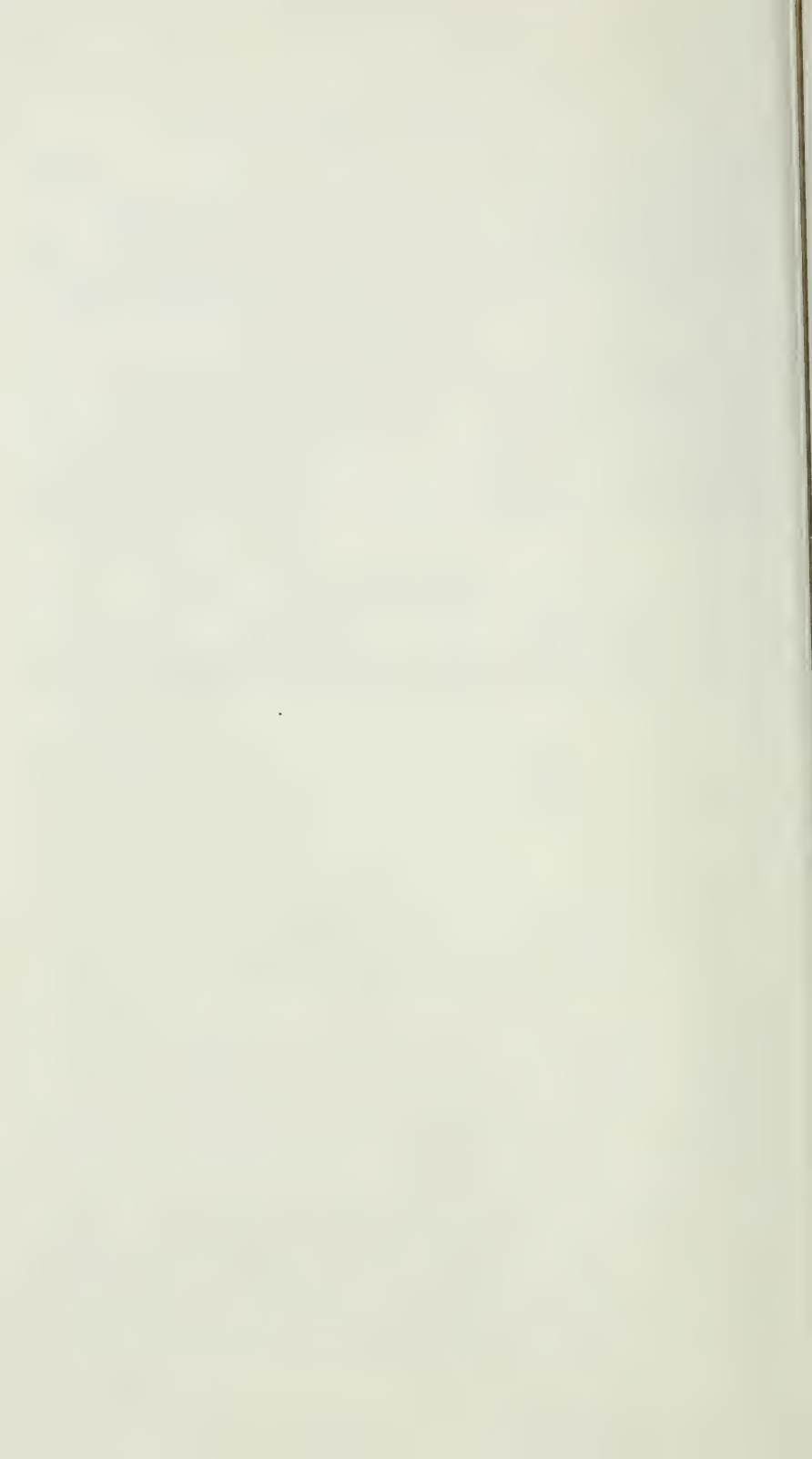
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Appellee.

APPELLANT'S REPLY BRIEF.

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

This appeal is from an order denying a petition of the receiver to subordinate the claim of the Bank of America under a confirmed plan of arrangement. There was no hearing on the merits because the Referee and the District Judge were of the opinion that the bankruptcy court was without jurisdiction to entertain the petition. The receiver sought in his petition to defer any payment of dividends to the Bank on its claim against the debtor until all the other creditors of the debtor had been paid upon the ground that the Bank was guilty of such misconduct in dealing

with all the other creditors of the debtor as to require the bankruptcy court, under the doctrine of *Pepper v. Litton* (1939), 308 U. S. 295, 84 L. Ed. 281, 60 S. Ct. 238, 41 A. B. R. (N. S.) 279, to subordinate payment of dividends on the Bank's claim in order to prevent injustice and unfairness in the administration of the estate. The order appealed from would operate to deny the receiver the opportunity to prove the conduct of the Bank, which was described in the receiver's original petition and supplement thereto and the amended petition, so that the truth and significance of the facts alleged by the receiver can be ascertained. This is, of course, an extremely drastic result.

The reasons underlying a judgment or order which denies a party his day in court should be compelling. It is for this reason that the courts have universally applied the rule that in cases sought to be determined on their pleadings, every inference must be drawn in favor of the pleader *Abel v. Munro* (1940, 2nd Cir.), 110 F. 2d 647; *Avrick v. Rockmont Envelope Co.* (1946, 10th Cir.), 155 F. 2d 568; *Lane-Bryant, Inc. v. Maternity Lane* (1949, 9th Cir.), 163 F. 2d 559.

Although we contend that all of the points made by appellee in its brief herein are completely answered in appellant's opening brief, there are certain statements and contentions in appellee's brief which we feel should not be left unchallenged; hence, this reply brief.

ARGUMENT.

I.

The Bankruptcy Court Had Jurisdiction to Entertain the Receiver's Petition and to Grant the Relief Sought Therein.

- (a) The Question of the Bank's Right to Receive Dividends on a Parity With Other Creditors Had Not Been Decided and Was Not Before This Court in the "Banker's Lien Appeal" and Therefore, the Bankruptcy Court Had Jurisdiction to Hear and Determine the Issues Raised by the Receiver's Petition.

The Bank's first contention is that the pendency of an appeal in this Court involving the same parties and arising out of the same Chapter XI proceedings somehow divested the bankruptcy court of jurisdiction to consider a petition to subordinate the payment of dividends on the Bank's claim.¹ The banker's lien appeal was from an order dated March 22, 1948, which constituted a ruling that a counterclaim asserted by the receiver against the Bank was not meritorious. On Page 7 of its brief, the Bank makes the following statement, with which we wholeheartedly agree:

"The test would seem to be whether the order of March 22, 1948, allowing the Bank's claim decided the question of parity. If it did, the lower court properly held that it had no jurisdiction to entertain this petition."

Following this quotation, the Bank acknowledges that the grounds for subordination asserted by the receiver

¹The pending appeal was *Goggin v. Bank of America* (No. 12206), which was under submission with this Court on rehearing at the time appellant's opening brief was filed. On June 23, 1950, this Court filed its opinion affirming the lower court. The mandate has been stayed until September 23, 1950, pending the filing of a petition for writ of certiorari with the Supreme Court of the United States.

on this appeal were not raised at the time the banker's lien matter was litigated. The Bank adds sarcastically that undoubtedly the receiver would have asserted his subordination contention at that time, if it was meritorious. Thus, the Bank appears to be advocating a rule of law which would require pleadings to be construed against the pleader and would favor a ruling thereon disposing of the matter on the merits. Such a rule of law runs counter to the fundamental premise underlying the entire Anglo-American jurisprudence that controversies should be determined on their merits upon the basis of evidence adduced in open court.

We respectfully request this Court to consider the record in the banker's lien appeal to determine whether or not that proceeding either decided or in any way involved the subordination issues presented by this appeal. On Pages 18-20 of appellant's opening brief herein, we have set forth the basic differences between the banker's lien proceeding and this proceeding. Although the Bank attempts to make much of the fact that the banker's lien litigation was commenced by the receiver's filing a document entitled *OBJECTIONS TO CLAIM OF THE BANK OF AMERICA . . . AND PRAYER FOR AFFIRMATIVE RELIEF* [Tr. 48 in Case No. 12206], an examination of that document reveals that it was in no sense intended to defeat the claim of the Bank. The receiver there sought to defer a determination of the amount of the Bank's claim because the receiver alleged that the value of the security asserted by the Bank was not yet determined.

The second aspect of that proceeding was a counter-claim in which the receiver sought to have the Bank turn over to the receiver the commercial paper upon which the Bank had asserted a banker's lien. It is thus clear that at no time has the receiver ever contended that the Bank did not have a valid claim against the debtor.

On page 6 of its brief the Bank cites the decision of this Court in *Rothschild & Co. v. Marshall* (1931), 51 F.

2d 897 as holding "that the District Court and Referee lose jurisdiction over a *matter* when an appeal is perfected to this Court." Aside from the fact that the *Rothschild* case does not involve a bankruptcy proceeding and, therefore, cannot possibly represent any rule of law as to the jurisdiction of the bankruptcy court, we would have no quarrel with the statement in the Bank's brief. The question is, however, what is the "matter" involved in the banker's lien appeal. The record in that appeal will show beyond any doubt that the only "matter" there involved was the propriety of the Bank's exercise of a banker's lien. There was nothing in that proceeding which could conceivably be construed to include any of the issues in the "matter" involved on this appeal. The fundamental distinction between the allowance of a claim and the postponement of dividends on an allowed claim was recognized by the Supreme Court in *Pepper v. Litton* (1939), 308 U. S. 295, 84 L. Ed. 281, 60 S. Ct. 238, 41 A. B. R. (N. S.) 279 in stating:

"Though disallowance of such claims will be ordered where they are fictitious or a sham, these cases do not turn on the existence or nonexistence of the debt. Rather they involve simply the question of order of payment."

Suffice it to say there must be a valid claim before there can be any question of subordination.

The effect of a pending appeal in a bankruptcy proceeding on the jurisdiction of the bankruptcy court would seem to be analogous to the doctrine of *res judicata*. In other words, if a final judgment in the banker's lien appeal would be *res judicata* on the subordination question, the Bank's position would be correct. The general rule is that in order to apply the principle of *res judicata*, it must be shown that the matter controverted in the second action was raised and litigated in the prior action. Thus, the allowance of a claim by a bankruptcy court is not *res*

judicata upon the issue of whether or not the creditor with the allowed claim has received a voidable preference from the bankrupt and the trustee may thereafter maintain an action to recover the preference.

Bloch v. Mill Factors Corp. (1941, 2nd Cir.), 119 F. 2d 536, 45 A. B. R. (N. S.) 748;

Stearns Salt & Lumber Co. v. Hammond (1914, 6th Cir.), 217 Fed. 559, 33 A. B. R. 484;

Buder v. Columbia Distilling Co. (1902, Mo.), 96 Mo. App. 558, 70 S. W. 508, 9 A. B. R. 331.

The Bank has seized upon the last sentence of the Referee's order in the banker's lien matter as making the parity question a part of that proceeding. [Tr. 179.] To be sure, the order provides that the claimant is entitled to dividends on its claim at the same rate paid to unsecured creditors, but read in context, it clearly appears that the language was used merely to instruct the receiver that no dividends were to be paid to the Bank until the security held by the Bank had been liquidated and the proceeds applied upon the claim. A proceeding in a bankruptcy matter is not like the ordinary litigation in which a judgment finally determines the controversy so that any appeal therefrom removes any further jurisdiction from the trial court. In a bankruptcy proceeding there may be many problems and disputes and an appeal from a ruling in connection with any single dispute does not in any way affect the jurisdiction of the bankruptcy court to proceed with the administration of the estate, even though it might require a determination of other disputes between the same parties who are involved in a pending appeal.

This fundamental distinction between bankruptcy proceedings and conventional civil litigation was recognized by Congress in defining the appellate jurisdiction of the Courts of Appeals under the Bankruptcy Act. The Courts of Appeals are given appellate jurisdiction from the bankruptcy courts "in proceedings in bankruptcy,

either interlocutory or final, and in controversies arising in proceedings in bankruptcy.”² A “controversy” is similar to the ordinary type of non-bankruptcy litigation.

Despite the many confusing cases dealing with the difference between bankruptcy matters as proceedings or controversies,³ it would seem to be beyond dispute that the banker’s lien appeal was a proceeding. (*McDaniel National Bank v. Bridwell* (1934, 8th Cir.), 74 F. 2d 311, 26 A. B. R. (N. S.) 748.) An interlocutory order in a proceeding in bankruptcy is expressly made appealable under Sec. 24 of the Bankruptcy Act. The order involved in the banker’s lien appeal was an interlocutory order because the amount of the claim allowed by the court was contingent upon the liquidation of the security. (*Robinson v. Edler* (1935, 9th Cir.), 78 F. 2d 817, 29 A. B. R. (N. S.) 502.)⁴

The taking of an appeal from an interlocutory order in a proceeding in bankruptcy does not, as it would with final orders, divest the bankruptcy court of jurisdiction to take further proceedings in the matter. (*Matter of Woodruff* (1941, 9th Cir.), 121 F. 2d 152, 46 A. B. R. (N. S.) 567; *Fernow v. Liberty Royalty Corp.* (1944, 10th Cir.), 146 F. 2d 396, 57 A. B. R. (N. S.) 659.)⁵

²Section 24 of the Bankruptcy Act, 11 U. S. C., Section 47.

³See 2 Collier on Bankruptcy (14th Ed.), pages 721, 734, 758, 763.

⁴In the cited case this Court held that such an order was interlocutory. However, under the provisions of the Bankruptcy Act in effect at that time, such an order was not appealable without leave of the appellate court. The statute has since been amended so as to make an appeal from such an order a matter of right provided the amount involved exceeds \$500.00; the amended statute was in effect and governed the banker’s lien appeal.

⁵In the *Woodruff* case, this Court ruled that the bankruptcy court had jurisdiction to hear and determine the account and petition for compensation of the receiver and his attorneys, notwithstanding the fact that there was then pending in this Court an appeal from an earlier order of the bankruptcy court directing the receiver and his attorneys to petition for compensation and fees.

By reason of the obvious difference between the issues involved in the banker's lien appeal and this appeal, there is no merit to the Bank's assertion that the former appeal defeated the jurisdiction of the bankruptcy court to entertain the subordination proceedings; the bankruptcy court had jurisdiction to proceed with the administration and distribution of the fund deposited by the debtor under the confirmed plan of arrangement.

Regardless of which party ultimately prevails in the banker's lien litigation, the final ruling will merely serve to determine the correct amount of the Bank's claim. Thus, if the Bank prevails in the banker's lien matter, its claim will be for a lesser amount than it would be if the receiver prevails because if the Bank is ordered to return to the receiver the proceeds from the commercial paper on which it exercised a banker's lien, the Bank's claim will thereby be increased by an amount equal to the judgment in favor of the receiver. Upon a final ruling in the banker's lien appeal, there will still be a question as to the Bank's right to participate in dividends on its claim. That is the question involved in the instant appeal and which was in no way disposed of in the banker's lien appeal.

(b) The Plan of Arrangement and the Order of Confirmation Contained Sufficient Reservations of Jurisdiction to Empower the Bankruptcy Court to Hear and Determine the Issues Raised by the Receiver's Petitions; There Was Such Jurisdiction in the Bankruptcy Court Independently of the Plan and Order of Confirmation.

The provisions of the plan of arrangement, the creditors' consents thereto, and the order of confirmation showing the express reservations of jurisdiction in the bankruptcy court have been summarized at length in our opening brief. The Bank's contention that the order of confirmation takes precedence over the plan has been answered in our opening brief. (Pages 27-34.) The Bank fails to give

any significance to the provision of Section 368 of the Bankruptcy Act which makes the arrangement the source of the bankruptcy court's jurisdiction after confirmation of the plan. Moreover, the Bank has failed to mention the fact that the plan of arrangement was incorporated by reference into the order of confirmation. [Tr. 41.] The plan itself being a part of the order of confirmation, there can be no validity to the Bank's contention that there is a variance between the order and the plan.

On Page 11 of its brief, the Bank refers to the phrase "the classification of said claims" as used in the order of confirmation [Tr. 43] in defining the court's reserved jurisdiction. The same phrase is used in the plan itself in the paragraph defining the fourth group of creditors therein designated as Class D. [Tr. 46.] The Bank argues that the quoted phrase pertains only to placing a particular claim within one of the four classes called for by the plan. However, in context, the phrase appears in the plan as a part of the paragraph defining the group of creditors designated as Class D. It must, therefore, be assumed that its inclusion in that paragraph is wholly without significance in order to adopt the Bank's interpretation; this assumption is untenable.

Class D creditors are those creditors remaining after the three classes of priority creditors described in the plan as Classes A, B and C, and it is provided, with respect to Class D "that there shall next be paid to all other creditors of the above-named debtor, a prorata dividend in the same manner and with like effect as if an order of adjudication were entered herein, and the trustee in bankruptcy was paying a partial or final dividend, said payments to be made at such time and in such amounts as the court may from time to time, upon the petition of any party in interest, order . . . " [Tr. 46.] The phrase "classifica-

tion of said claims" immediately follows the foregoing provision in the plan as a part of the same sentence.

Thus, if a bankruptcy court, after an adjudication, would have jurisdiction to subordinate the claim of one unsecured creditor to the claims of other unsecured creditors, it could do so under the confirmed plan of arrangement in the instant case. The authorities showing that there is such jurisdiction in the bankruptcy court are legion and no reference is made to them in this reply brief for the reason that they are fully covered in our opening brief.

On Page 26 of its brief, the Bank again concedes that "a Bankruptcy Court has the general power and jurisdiction to subordinate the payment of dividends on claims as between creditors of the same class." The Bank, however, would limit the rule to straight bankruptcy proceedings where there has been an adjudication in bankruptcy. The contention seems to be that in Chapter XI proceedings, the court has only such jurisdiction as is expressly reserved in the order of confirmation. For the reasons set forth in our opening brief (Pages 34-38), the bankruptcy court in Chapter XI proceedings has inherent jurisdiction to subordinate the claim of one creditor to other creditors of the same class, regardless of the provisions of the plan and order of confirmation. It would appear, however, even under the Bank's view of the law, that there would be jurisdiction in the bankruptcy court in the instant case. A reading of the plan of arrangement, the consents of the creditors thereto, and the order of confirmation makes it abundantly clear that the draftsman of these documents took pains to provide that the administration of the estate after confirmation of the plan, was to be to like effect as if there had been an adjudication in bankruptcy and the receiver appointed as trustee in bankruptcy. Therefore, if in an ordinary bankruptcy proceeding, the bankruptcy court would have such jurisdiction and the trustee in bankruptcy would have authority to

bring such a petition, the bankruptcy court and the receiver in the instant case had jurisdiction and authority to subordinate the claim of the Bank to the claims of other creditors. The Bank, in support of its contention, has omitted to make any reference to or give any significance to these provisions of the arrangement, the consents thereto, and the order of confirmation.

In arguing that the receiver in this case is a sort of interloper in a controversy between creditors, the Bank has overlooked the numerous cases in which the courts have recognized the duty of the trustee in bankruptcy to bring before the bankruptcy court the facts and circumstances surrounding any claim so that dividends thereon will be subordinated to dividends paid on other claims where warranted after considering all the facts surrounding the claim. Some of the leading cases are mentioned on page 39 of our opening brief, but the Bank has failed to discuss those cases in its brief herein. In the instant case the receiver has alleged that all of the existing general unsecured creditors of the debtor were misled and prejudiced by the conduct of the Bank. Accordingly, if subordination of the Bank's claim is warranted, all of those creditors, would benefit. In any case where a receiver or a trustee succeeds in subordinating the claim of one creditor to the claims of other creditors he is taking sides in a matter which can be described as a controversy between creditors. However, he is the representative of the creditors generally and it is his duty to take whatever action is for their benefit. Even in objecting to a claim, a trustee in bankruptcy or a receiver is intervening in a matter which does not personally concern him but if he is successful in defeating the

claim, all of the other creditors will receive the benefit, unless, of course, any one of them has a claim which should be subordinated.

The Bank has cited *Prudence Realization v. Ferris*, 323 U. S. 650, 654, L. Ed. 528; *In re East Boston Coal Co.* (D. C. Pa.), 47 Fed. Supp. 593; and *In re Gordon* (D. C. S. D., N. Y. 1942) (Pages 15-21 of Appellee's Brief), in support of its position, but it has wholly ignored our discussion of those cases in appellant's opening brief in which we pointed out that they are all either Chapter X cases or they involve a situation where the bankruptcy court's jurisdiction is invoked after the entry of the final order discharging the receiver. The Bank merely mentions our contentions only to expressly ignore them. This, however, does not change the law. We pointed out in Footnote 18 on Page 31 of our opening brief that there is an express statutory distinction between Chapter X and Chapter XI insofar as the confirmation order may vary the plan of arrangement with respect to reserved jurisdiction. Moreover, there is another statutory distinction between the two chapters with respect to the court's right to modify a confirmed plan of arrangement. In Chapter X there is such authority in the bankruptcy court where there is none in Chapter XI (See Footnote 15, Page 29 of appellant's opening brief). Although the Bank takes the position that Chapter X and Chapter XI are similar, the distinctions above noted show that Chapter X cases are not controlling on the question involved in this Chapter XI proceeding.

Matter of Gordon (D. C. S. D., N. Y. 1942, 44 Fed. Supp. 581, cited at Pages 19-21 of the Bank's brief

herein) was a Chapter XI proceeding but the very portions of the opinion quoted by the Bank in its brief evidence the distinction between that case and the instant case. In the first place, the *Gordon* case clearly recognizes that jurisdiction may be retained by express reservation in a plan of arrangement. We think that was done in the instant case. Moreover, in the quotation from the *Gordon* case appearing on Page 19 of appellee's brief, the court recognized the reserved jurisdiction under Sections 369-370 of the Bankruptcy Act. Those sections would give the court jurisdiction to hear and determine a controversy such as that presented in the instant case. As has heretofore been demonstrated, the Bank's claim was in an unliquidated amount and was scheduled by the debtor. The claim cannot become liquidated until final disposition of the banker's lien appeal. Under Section 369(2) the court has jurisdiction over a dispute pertaining to such a claim.

On Page 21 of its brief, the Bank quotes a portion of the *Gordon* opinion in which the court speaks of "post-confirmation claims and post-confirmation conduct." The claim of the Bank, however, is a pre-confirmation claim; the conduct of the Bank set forth in the receiver's petitions was also prior to confirmation and, in fact, was prior to the commencement of the Chapter XI proceedings.

In summary on this point, it is respectfully submitted that the bankruptcy court in the instant case had jurisdiction, under the plan of arrangement, the order of confirmation and under its inherent jurisdiction, over the distribution of the funds in its possession which were to be administered as if there had been an adjudication in bankruptcy.

II.

The Petition and Supplement Thereto as Well as the Amended Petition Contained Allegations Sufficient to Warrant the Granting of the Relief Prayed For.

(a) The Receiver Had the Right, Power and Authority to Initiate the Current Proceedings.

A complete answer to the Bank's argument as set forth on Pages 22-28 of its brief herein, is contained on Pages 38-45 of appellant's opening brief. We do not desire to burden this Court with a repetition of the matters set forth in our opening brief other than to quote the succinct description of the trustee's duties as stated by Professor Collier:

"The trustee's virtually exclusive right to object on behalf of creditors has just been discussed in connection with the rights of the bankrupt and the creditors. It is the corollary of his statutory duty under §47a(8) to 'examine all proofs of claim and object to the allowance of such claims as may be improper.' A trustee in bankruptcy has not only the right, but the duty to object to any claim not entitled to proof or allowance. This duty *virtute officii* may be enforced by the court upon petition of a creditor or the bankrupt. It also extends to the case in which a creditor has an allowable claim against the bankrupt, but a claim that should not be treated on a footing of equality with the claims of creditors who have been wronged by the claimant. It is then the trustee's duty to object and to see to it that the claim be subordinated to those of the wronged creditor or creditors."⁶

⁶3 Collier on Bankruptcy (14th Ed.), pages 226-227.

The foregoing quotation also demonstrates the distinction between the allowance of a claim and the subordination of an allowed claim.

The ~~bankrupt~~ has again cited to this Court the case of *Schroeder v. Brack* (1935, 7th Cir.), 78 F. 2d 530, 29 A. B. R. (N. S.) 444 (this is the same case referred to as *In re Railroad Supply Co.* on page 43 of our opening brief). As pointed out in our opening brief, however, this Court in *Bank of America v. Erickson* (1941), 117 F. 2d 796, 45 A. B. R. (N. S.) 503, ruled that the *Railroad Supply* case only concerned a dispute between two creditors of a bankrupt which was of no concern to other creditors or to the estate. It would appear that the Bank is attempting to come within the *Railroad Supply* rule upon the basis of its assertion that the instant case involves conduct of the Bank which affected only some of the creditors of the debtor. This assertion is, however, contrary to the pleadings which are deemed admitted for the purpose of this appeal. The receiver alleged in the supplement to his original petition:

“That the current unpaid trade creditors in the within reorganization proceedings extended credit to the debtor substantially in reliance upon the position taken by the Bank of America and the misinformation circulated by it in connection with the financial condition of the debtor and the purported financial support thereof by Northrop Aircraft, Inc.; that the Bank of America well knew that the said creditors would so rely upon the facts as alleged hereinabove in extending credit to the debtor herein.” [Tr. 65.]⁷

⁷The allegations in the amended petition were even more specific on this score:

“That in extending credit to the debtor, all of the persons who are the general unsecured and unpaid trade creditors of the debtor herein and whose claims have been allowed by this Court relied upon and were misled by the conduct of and the credit information given by the Bank of America as hereinabove particularly described.” [Tr. 100.]

Since the pleadings must be construed in favor of the pleader, it would seem clear that the aforementioned allegation sufficiently establishes that the conduct of the Bank affected all of the unpaid trade creditors in the within proceedings.

We do not mean to indicate by the foregoing that we concur in the Bank's statement of the law that in order for a trustee in bankruptcy to subordinate the claim of one creditor, he must show that the conduct of that creditor adversely affected all of the remaining creditors. The Supreme Court has indicated that such is not the law and that a trustee may properly subordinate the claim of one creditor to the claim of only a portion of the remaining creditors. (*American Surety Co. v. Sampsell* (1946), 327 U. S. 269, 90 L. Ed. 663, 66 S. Ct. 571.) In that case the Supreme Court of the United States affirmed a judgment of this Court holding that a trustee in bankruptcy had authority and the bankruptcy court had jurisdiction to subordinate the claim of one creditor to the claims of certain creditors.

Thus, the Bank's premise is not in accordance with the settled law. However, the pleadings in the instant case are to the effect that *all* of the creditors were misled by the Bank's conduct. In view of the facts stated by the receiver in his petitions, he would have been derelict in his duty had he not brought them to the attention of the bankruptcy court.

(b) The Allegations in the Petition and Supplement Thereto as Well as the Amended Petition Are Sufficient to Warrant Subordination of the Bank's Claim to Those of All Creditors.

The Bank's assertions on pages 28 and 29 of its brief that the receiver was never refused permission to file his amended petition is not only without support in the record but is in direct conflict therewith. At the conclusion of the original hearing when the Referee indicated his ruling

would be adverse to the receiver, counsel for the receiver, in open court, sought leave to amend the petition and the Referee indicated that leave would be granted; however, after a colloquy with counsel for the Bank, who objected to the granting of leave to amend, the Referee stated that his ruling would be limited to the lack of jurisdiction objection made by the Bank. [Tr. 159-160.] Therefore, no amendment would be appropriate under such a ruling. Thereafter, there was a hearing upon the receiver's motion to reconsider that ruling and when the Referee denied the motion, counsel for the receiver again sought leave to file an amended petition and again counsel for the Bank objected; whereupon the Referee ruled "I will deny your right to file the amended petition at this time." [Tr. 155-157.] The Bank then submitted a form of order to which the receiver filed objections. [Tr. 86-91.] In his objections to the form of order the receiver formally sought leave to file an amended petition in the event the Referee was inclined to rule that the allegations in the original petition and supplement thereto did not sufficiently state a cause of action [Tr. 89-91], and a copy of the proposed amended petition was attached to the objections. The objections to the form of order came on for hearing and at the conclusion thereof, the Referee overruled the receiver's objections and counsel for the receiver requested leave to file the amended petition. At this point the Referee permitted the receiver to "file" the amended petition and stated "but I am not granting you permission to file it with the thought that I will pay any attention to it. . . . You can file any document you want, but it must be understood it was filed after I made my ruling." [Tr. 165-166.]

The record, therefore, shows a consistent and continuous attempt on the part of the receiver to file an amended petition with a persistent refusal on the part of the Referee to permit the amendment. Although eventually the Referee permitted the receiver to file the amended

petition, he made it clear that he would not “pay any attention to it.” [Tr. 165.]

This brief summary of the record demonstrates the inaccuracy of the statements contained at pages 28 and 29 of the Bank’s brief. Despite this record, the Bank draws an inference that counsel for the receiver was extremely reluctant to file the amended petition because the amendment was proposed only after the Referee had announced his ruling adverse to the receiver. Surely counsel for the Bank is aware that leave to amend a pleading is generally sought only after a court has ruled that the original pleading is defective.

The Bank closes its argument with a reference to two relatively recent Supreme Court decisions, *Comstock v. Institutional Investors* (1947), 335 U. S. 211, 92 L. Ed. 1911, 1923, and *Manufacturers Trust Co. v. Becker* (1949), 338 U. S. 304, 94 L. Ed. 99, 70 S. Ct. 127. We have already referred to the *Manufacturers Trust Co.* case in our opening brief (page 37). The *Comstock* case constitutes a compelling authority in support of the position of appellant herein. There the Supreme Court affirmed the judgment of the Court of Appeals for the 8th Circuit which, in turn, had affirmed the judgment of the trial court refusing to subordinate the claim of a parent corporation asserted against its subsidiary in a railroad reorganization proceeding. A reading of the opinion shows that the controversy was fully tried on all of the facts, at the conclusion of which the trial court made findings that the parent corporation had acted in good faith at all times, that the indebtedness upon which its claim against its subsidiary was based was a valid indebtedness, and that the proceeds of the loans had been used for the benefit of its subsidiary and its creditors. By reason of these findings and their affirmance by the Court of Appeals, the Supreme Court affirmed the judgment, stating: “A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of exceptional error.”

(Citing numerous cases.) There was a four-man dissent because the dissenting justices felt that there was an exceptional error in the record. In any event, that case illustrates the necessity for the bankruptcy court's holding a hearing upon the pleadings which are alleged to require the subordination of one claim to the claims of other creditors. Thus far, the receiver in the instant case has been denied that right. If the receiver is given the opportunity to go to trial upon the basis of his pleadings, he cannot and surely will not complain if he is not able to prove by appropriate evidence that which he has alleged.

The authorities discussed in our opening brief establish that a court of bankruptcy, upon a proper showing, has jurisdiction to subordinate the payment of the claims of one creditor to those of the other creditors of the same class where such subordination will further the ends of justice and equity. Upon proof of the allegations of the receiver's petition and supplement thereto or the amended petition the claim of the Bank should be subordinated to the claims of other creditors. Thus, upon the pleadings, the receiver is entitled to the relief requested.

Conclusion.

We respectfully contend that the record in this case requires a reversal of the rulings below. The banker's lien appeal was wholly foreign to the matters involved in this appeal and its pendency in no way affected the power of the bankruptcy court to determine the order of payment of dividends on claims. Under the plan of arrangement, the order of confirmation thereof and the inherent jurisdiction of the bankruptcy court to administer the fund in its possession, there was clearly jurisdiction to hear and

determine the receiver's petitions. Furthermore, a perusal of these documents shows that it was the intent of all of the parties concerned to carry on the Chapter XI proceedings as if there had been an adjudication in bankruptcy. The Bank has conceded that had there been such an adjudication, the court would have had jurisdiction. This constitutes a concession that the rulings below were erroneous because by the express provisions of the plan and order of confirmation, the jurisdiction of the bankruptcy court and the authority of the receiver were defined to be co-extensive with that which would have prevailed had there been an adjudication in bankruptcy.

The pleadings, which are the basis of this appeal, are deemed admitted and they entitle the receiver to the relief requested. The receiver, for the benefit of the unsecured creditors of the debtor who were misled by the wrongful conduct of the Bank, is merely asking for the opportunity to prove the allegations of his petitions. Only in this manner can the bankruptcy court sift the circumstances surrounding the Bank's claim to see that the distribution of the consideration deposited by the debtor under the confirmed plan of arrangement is administered pursuant to law, equity and justice.

It is, therefore urged that the orders appealed from be reversed and the matter remanded to the bankruptcy court with directions to proceed upon the allegations of the receiver's amended petition.

Respectfully submitted,

GENDEL & RASKOFF,

By H. MILES RASKOFF,

Attorneys for Appellant.

No. 12498

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, as Receiver of the Estate of SALSBUURY
MOTORS, INC., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIA-
TION,

Appellee.

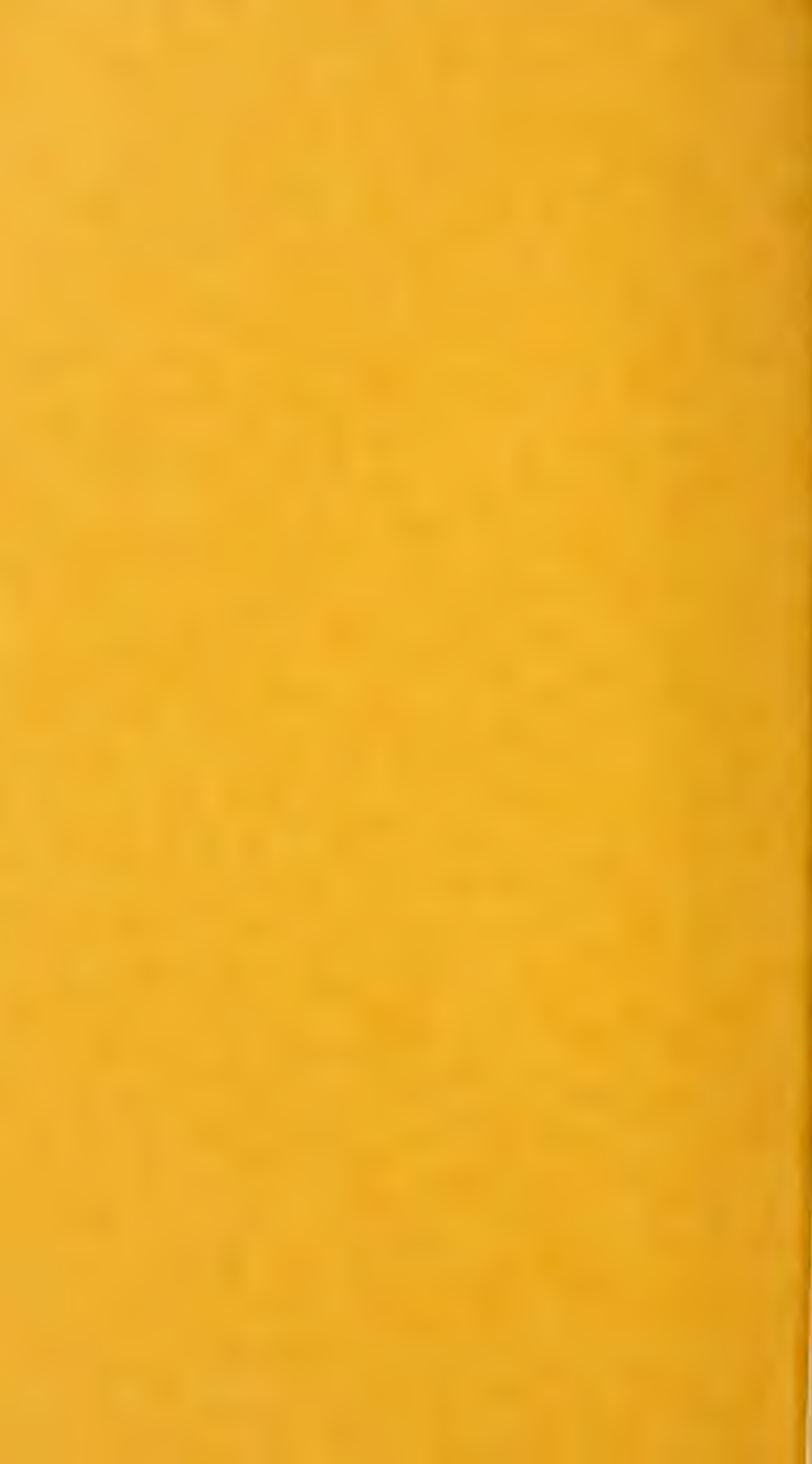
PETITION FOR REHEARING.

GENDEL & RASKOFF,

810 Oviatt Building, Los Angeles 14,

*Attorneys for George T. Goggin, Receiver of the
Estate of Salsbury Motors, Inc., Debtor.*

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No. 12498

IN THE

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MOTORS, INC., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIA-
TION,

Appellee.

PETITION FOR REHEARING.

*To: The Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

Your petitioner herein, George T. Goggin (hereinafter referred to as "Receiver") as receiver in bankruptcy of the estate of Salsbury Motors, Inc., and appellant herein, respectfully petitions this Honorable Court for a rehearing of the judgment of this Court rendered herein on January 5, 1951, with a written opinion by Judge Orr after a hearing before Judges Stephens, Bone and Orr.

Introduction.

Except for the issue as to the effect of the prior appeal (hereinafter referred to as "banker's lien appeal"), the opinion of this Court filed on January 5, 1951, resolved all of the issues involved in this appeal in favor of appellant. Although it was conceded by the appellee that neither the pleadings nor the evidence in the banker's lien proceeding raised any issue as to the subordination of the Bank's

claim to the claims of other creditors, this Court construed the last paragraph of the banker's lien order as having decided the subordination question, and therefore ruled that the bankruptcy court lost jurisdiction to act on the receiver's subordination petition. This, we respectfully urge, constituted an unreasonable and erroneous interpretation of the banker's lien order and an unwarranted restriction upon the jurisdiction of the bankruptcy court.

Grounds for Petition.

The ruling of this Court as to the effect of the banker's lien appeal on the jurisdiction of the bankruptcy court to entertain the receiver's petition for subordination of the Bank's claim should be reconsidered upon the following grounds:

1. The banker's lien order did not involve any issue or the consideration of any evidence as to subordination of the Bank's claim and, therefore, could not have determined any such issue.

2. Even if the banker's lien order is construed by this Court as determining the order of payment of dividends on the Bank's claim, the petition for subordination should be considered as a petition for reconsideration of the order of allowance under Section 57(k) of the Bankruptcy Act.

3. The banker's lien appeal was from an interlocutory order in a proceeding in bankruptcy and, therefore, its pendency did not divest the bankruptcy court of jurisdiction to act on the question of subordination of the Bank's claim.

4. If the banker's lien appeal is deemed to have divested the bankruptcy court of jurisdiction to act on a petition for subordination, this Court should, by its mandate, direct the bankruptcy court to hear and determine the receiver's amended petition.

I.

The Banker's Lien Order Did Not Involve Any Issue or the Consideration of Any Evidence as to Subordination of the Bank's Claim and, Therefore, Could Not Have Determined Any Such Issue.

In its opinion herein this Court has gone no further than the order in the banker's lien appeal in determining that it disposed of the subordination question. This, we submit, was improper. The Supreme Court of the United States has held that in construing the scope and effect of any judgment where the plea of *res judicata* or estoppel by judgment is involved, the Court must resort to the pleadings and the evidence presented in the earlier proceedings to determine whether or not the issues raised by the more recent litigation were in fact determined in the earlier litigation, notwithstanding the fact that the earlier judgment might contain language seemingly disposing of the issues raised in the more recent litigation.

It is conceded by the Bank, as indeed it must, that "the grounds for subordination here urged by counsel for the receiver were not raised by him at the time he objected to the Bank's claim . . ." (App. Br. p. 7.) A thorough and painstaking examination of the record in the banker's lien appeal, including both opinions of this Court, will not reveal a single pleading, statement, reference or intimation that presented a question as to whether or not payment of dividends on the Bank's claim should be subordinated to the claims of other creditors on equitable grounds. That record shows without any question that the sole matter decided was whether or not the Bank had properly exercised its banker's lien under Section 3054 of the Civil Code of the State of California in seizing certain commercial paper belonging to the debtor and applying the pro-

ceeds therefrom against the indebtedness of the debtor to the Bank, thereby reducing the Bank's claim asserted in the Chapter XI proceeding. The receiver attempted to obtain an order from the bankruptcy court directing the Bank to return to the receiver either the commercial paper seized or the proceeds therefrom which might have been collected by the Bank. The ruling against the receiver in that case has now become final.

In the instant proceeding, however, the cause of action was based upon allegations that the Bank had induced other creditors to extend credit to the debtor by knowingly giving false information concerning the debtor's financial condition. Despite the total dissimilarity in the nature of the two causes of action and the legal and factual issues involved, this Court has taken the last sentence of the banker's lien order as having determined the subordination cause of action.

The only reason this sentence appeared in the order was because the Bank had yet to liquidate certain real property held as security under a trust deed and the uncertainty of the amount of recovery led to the language in the last sentence; there was no dispute as to this issue.

A controlling decision of the Supreme Court demonstrates that the banker's lien order cannot be construed as *res judicata*. The case of *Vicksburg v. Henson* (1913), 231 U. S. 259, presented a situation strikingly similar to that of the instant case. In that case the City of Vicksburg had granted a franchise to a corporation to furnish the city with water for a term of thirty years. Fourteen years later the city attempted to derogate from the franchise by undertaking to build, and thereafter to operate, a waterworks system of its own. The corporation that had been given the franchise filed suit against

the city to enjoin the infringement on its franchise and was successful in obtaining an injunction. The city was thereby enjoined from issuing bonds for the purpose of constructing its water system and from actually constructing the water system "during the period prescribed in said ordinance, contract and franchise." Thus, the order clearly and unequivocally enjoined the city from issuing bonds for constructing a water system for the balance of the full thirty-year period of the franchise. The city appealed in that case but the decree was affirmed by the Court of Appeals and by the Supreme Court of the United States and the injunction containing the above quoted language as to its duration became final. Thereafter, four years prior to the termination of the thirty-year franchise, the city undertook by proper resolution and election to authorize a sale of bonds for the construction of a waterworks plans which was not to be operated until after the expiration of the franchise. Whereupon, the representative of the corporation holding the franchise brought suit to enjoin the bond issue and the construction of the waterworks on the ground that the issue as to the issuance of the bonds and the construction of the water system at any time during the thirty-year franchise was *res judicata* under the decree granted against the city in the former action. The District Court of the United States in which the action was filed granted the injunction, which was affirmed on appeal to the Court of Appeals for the Fifth Circuit. This ruling was reversed on appeal to the Supreme Court, notwithstanding the fact that the literal wording of the decree in the earlier case had, by its terms, disposed of the question. The Supreme Court reasoned that the decree in the earlier case could not be given the binding effect given it by the District Court and the Circuit Court because a consideration of the plead-

ings, the issues and the evidence in the earlier case showed that it was not intended to have that effect nor to dispose of the current issues. The Court pointed out that the purpose of the earlier decree was merely to protect the thirty-year franchise. The fact that the city intended to take action during the term of the franchise to prepare itself to operate its own water system immediately upon expiration of the thirty-year franchise could not be held to interfere with the franchise so long as the new water system was not operated prior to its termination. The Supreme Court took the realistic view that it would take some time for the city to erect its waterworks system and, notwithstanding the contrary language in the earlier decree, held that it could be done. The Court stated (231 U. S. at 268):

“Coming to the question whether the former decree disposed of the rights of the parties, as was held in the court below, which judgment was affirmed by the Circuit Court of Appeals, it is undoubtedly true that a right, question or fact put in issue and decided by a court of competent jurisdiction must be taken as settling the rights of the parties in respect to such controversy and while it remains undisturbed is conclusive between them. The enforcement of this rule has been repeatedly said to be essential to secure the peace and repose of society and in order that an end may be made of controversies between parties who have once invoked and have had the determination by a competent judicial tribunal of the matters in dispute between them. It is no less true that to hold upon any unsubstantial ground that a controversy has been thus concluded is to do an injustice to litigants. We must therefore be careful to see, when the contention of former adjudication is made, that the matter was actually presented and decided and

the rights of the contending parties thereby concluded. We think that an examination of the record in the former case, put in evidence in this case, does not support the contention that the matter here in issue was then adjudicated and determined. It is true there is some broad language in the decree.”

“It is well settled, however, that a decree is to be construed with reference to the issues it was meant to decide. *Graham v. Railroad Company*, 3 Wall. 704, 710; *Reynolds v. Stockton*, 140 U. S. 254; *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, 507; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217, 223. In *Barnes v. Chicago, M. & St. P. Ry. Co.*, 122 U. S. 1, this court, speaking by Mr. Chief Justice Waite, said (p. 14):

“‘Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. *Graham v. Railroad Company*, 3 Wall. 704. Here the suit was by and for creditors to set aside the mortgage to Barnes and the foreclosure thereunder, because made and had to hinder and delay them in the collection of their debts. The decree, therefore, although broader in its terms, must be held to mean no more than that the foreclosure was void as to these creditors, whose claims were inferior in right to that of the mortgage, and that the Minnesota Company was restrained and enjoined from asserting title as against them.’

“The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues

made and intended to be submitted and what the decree was really designed to accomplish. We cannot agree with the court below or with the majority of the Circuit Court of Appeals that the effect of the former adjudication was to preclude the rights of the parties in the present controversy.”

See also

Radford v. Myers (1914), 231 U. S. 725.

The Supreme Court in the case of *Reynolds v. Stockton* (1891), 140 U. S. 254, approved and adopted the statement of principles of the New Jersey Court of Errors and Appeals in the case of *Munday v. Vail*, 34 N. J. Law 418. The Supreme Court stated (140 U. S. at 269):

“ . . . We regard the views suggested in the quotation from the opinion as correct, and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*.”

The quotation from the opinion referred to by the Supreme Court is as follows (140 U. S. at 268):

“ . . . A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in question, that a power of judicial

decision arises. And again: 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus, Lord Coke, treating of this doctrine, says: "A matter alleged that is neither traversable nor material shall not estop." Co. Litt. 352b. And in a note to the *Duchess of Kingston's Case*, in 2 Smith's Lead. Cases, 535, Baron Comyn is vouched for the proposition that judgments "are conclusive as to nothing which might not have been in question, or were not material." For the same doctrine, that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon "the property according to the rights that appear" upon the record, I refer to the authority of Lord Redesdale. *Giffard v. Hort*, 1 Sch. & Lef. 386, 408. See also *Gore v. Stacpoole*, 1 Dow, 18, 30; *Colclough v. Sterum*, 3 Bligh, 181, 186.' Reference is made in the opinion to the case of *Corwithe v. Griffing*, 21 Barb. 9, in respect to which the court said: 'Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, "as the jurisdiction was confined to the subject-matter set forth and described in the petition." In this case the court had juris-

diction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.’ ”

The *Vicksburg* and *Reynolds* cases, we think, require a reconsideration of the ruling in the instant case in the light of the principles there announced. The banker's lien order could not and did not decide the question of subordination. As heretofore pointed out, this was the fundamental basis of the decision of the Supreme Court in the leading bankruptcy case on equitable subordination, to-wit, *Pepper v. Litton* (1939), 308 U. S. 295. There, it will be recalled, the Supreme Court ruled that the bankruptcy court had jurisdiction to subordinate a claim in bankruptcy by reason of the misconduct of the claimant in acquiring the claim, notwithstanding the fact that the claim was based upon a final and binding judgment of a state court, which judgment had been collaterally attacked without success both by the bankrupt and by the trustee. The Supreme Court stated:

“ . . . On the pleadings in the state court the validity of the underlying claim was not in issue. Nor was there presented to the state court the question of whether or not the Litton judgment might be subordinated to the claims of other creditors upon equitable principles.”

And so, in the instant case, neither on the pleadings nor in the evidence was there presented any question in the banker's lien proceeding of whether or not payment of dividends on the Bank's claim might be subordinated to the claims of other creditors upon equitable principles. This distinguishes our case from *Diamond Laundry Corp. v. California Employment Stabilization Commission* (9th Cir., 1947), 162 F. 2d 398. In that case the very issues

which were before this Court on appeal were sought to be relitigated at the same time before the bankruptcy court. In the instant case, however, the issues in the two proceedings were not only not identical but wholly without similarity.

II.

Even if the Banker's Lien Order Is Construed by This Court as Determining the Order of Payment of Dividends on the Bank's Claim, the Petition for Subordination Should Be Considered as a Petition for Reconsideration of the Order of Allowance Under Section 57k of the Bankruptcy Act.

Section 57k of the Bankruptcy Act provides:

“Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.”

It is not without significance that this was the section relied upon by the Supreme Court in *Pepper v. Litton* as empowering courts of bankruptcy to subordinate the claims of one creditor to claims of others, notwithstanding the fact that the claim is recognized and allowed as a binding legal obligation. Moreover, the Supreme Court made it clear that the right to subordinate thus authorized is in no way impaired by the fact that there has been previous litigation concerning the validity of the claim, with a final binding judgment that it is a valid claim. Of course, it must necessarily be true that there must be a point where the litigation comes to an end. That point was reached in *Heiser v. Woodruff* (1946), 327 U. S. 726. There the Court pointed out that unlike *Pepper v. Litton*, the issue of fraud on which the trustee in *Heiser v. Woodruff* relied in support of his petition to sub-

diction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.’ ”

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Section 57k of the Bankruptcy Act provides:

“Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.”

It is not without significance that this was the section relied upon by the Supreme Court in *Pepper v. Litton* as empowering courts of bankruptcy to subordinate the claims of one creditor to claims of others, notwithstanding the fact that the claim is recognized and allowed as a binding legal obligation. Moreover, the Supreme Court made it clear that the right to subordinate thus authorized is in no way impaired by the fact that there has been previous litigation concerning the validity of the claim, with a final binding judgment that it is a valid claim. Of course, it must necessarily be true that there must be a point where the litigation comes to an end. That point was reached in *Heiser v. Woodruff* (1946), 327 U. S. 726. There the Court pointed out that unlike *Pepper v. Litton*, the issue of fraud on which the trustee in *Heiser v. Woodruff* relied in support of his petition to sub-

ordinate the claim, had actually been raised, tried and disposed of adversely in the non-bankruptcy court that had rendered the judgment upon which the claim in bankruptcy was grounded. This then became *res judicata* and beyond the power of the bankruptcy court to redetermine.

This brings us to a consideration of the record in the banker's lien proceeding to determine whether or not the language in the order pertaining to the payment of dividends could have constituted a determination of any issues presented to the Court for decision in the subordination proceeding. Clearly, it did not.

Professor Collier recognizes Section 57k as a restriction upon the doctrine of *res judicata* which is made necessary by the peculiar nature of a bankruptcy proceeding; he states:

“No procedural system can dispense with some measure of derogation from the rigid rules of *res judicata* where manifest injustice has been done due to some inadvertance, clerical error, gross factual mistake, or the like. The Federal Rules of Civil Procedure provide for such relief within the limits of Rules 59 and 60. Bankruptcy proceedings, where time is of the essence, are fraught with dangers of errors and inaccuracies, due to the multiplicity of interested but frequently ill-informed parties, as well as to the comparatively late stage at which a common trustee replaces the individual claimants. The general power of the bankruptcy court within certain limitations to correct its own mistakes or reconsider matters already disposed of, or, as it is called, the right to rehear its orders, *sua sponte* or upon motion of a party in interest, cannot now be seriously controverted. With respect to the bankruptcy court's

power to reconsider orders of *allowance* and *disallowance* of claims, the Act is more specific.” (3 Collier on Bankruptcy, 14th Ed., 302.)

Professor Collier then goes on to refer to Section 57 (k) of the Bankruptcy Act as giving bankruptcy courts the authority to reconsider allowed claims at any time prior to the closing of the estate. He also directs attention to the numerous cases holding that the time limitations of Rules 59 and 60 of the Federal Rules pertaining to new trials and relief from judgments and orders do not apply to bankruptcy proceedings. Two such recent cases are *Indemnity Insurance Co. v. Reisley* (2nd Cir. 1946) 153 F. 2d 296, and *Bailey v. Proctor* (1st Cir., 1948) 166 F. 2d 392.

The Court of Appeals for the Second Circuit applies similar reasoning in the *Matter of Jayrose Millinery Co., Inc.* (1937), 93 F. 2d 471, 35 A. B. R. (N. S.) 354, by stating:

“ . . . The purpose of this section is to protect the estate against claims which have been erroneously allowed; not to protect the creditor against partial disallowance. He needs no such protection. If he is aggrieved by the referee's order of allowance, he may petition for review by the District Court and, if necessary, appeal from the court's order. But the remedy by review and appeal would not be adequate protection for the estate. Claims are usually allowed before the trustee or other creditors have had any opportunity to get sufficient information to oppose them or to determine whether the allowance is correct. Subsequent investigation may show the allowance was wrong in whole or in part, and section 57 (k) provides the procedure for correcting it.”

The instant case demonstrates the wisdom of the Congressional policy behind Section 57(k). We have here a receiver taking over the assets of a debtor which are estimated to be in excess of \$2,000,000.00 [Tr. 18] for the benefit of creditors in excess of \$2,700,000.00 [Tr. 16]. It would not be humanly possible within any fixed period of time for a bankruptcy administrator to acquire sufficient information with respect to such a vast and complicated business to enable him to assert all of the facts, objections, or defenses that might exist with respect to any claim or to assert reasons that it should be subordinated. By reason of the nature of the proceedings he might not come into possession of facts as to the fraudulent conduct of a claimant until many months or even years after a claim has been allowed. Hence Congress has provided that the only time limitation is the pendency of the bankruptcy proceedings and under Section 57(k) an allowed claim may be reconsidered at any time prior to the closing of the estate. As a matter of fact, Section 57(1) expressly gives jurisdiction to the bankruptcy court to entertain a proceeding by a trustee to recover dividends already paid after reconsideration and rejection of a claim in whole or in part. (See 3 Collier on Bankruptcy (14th Ed.) 314, and *Boyum v. Johnson* (8th Cir., 1942), 127 F. 2d 491, 49 A. B. R. (N. S.) 228.)

There is another obvious reason why a bankruptcy administrator might not be interested in attempting to subordinate a claim being asserted in the bankruptcy by a person against whom the trustee or receiver is attempting to

recover assets for the estate. Surely, this Court judicially knows that in the greatest number of bankruptcy proceedings no dividends are available for general creditors. Aside from the many cases where there are no assets at all being administered by the bankruptcy court, there are many cases where the assets that are being administered are completely consumed by prior claims, such as tax and labor claims and expenses of administration. Until the trustee or receiver, as the case may be, has collected all of the assets belonging to the estate and has determined and paid the priority claims, he is ordinarily in no position to know whether or not dividends will be available for the general creditors. For this reason such an administrator might be properly criticized for spending money of the estate in litigating a question of subordination when in fact the question may be academic because nothing will be available for the general creditors in any event. It, therefore, follows that it is neither unusual nor improper for a receiver to first attempt to recover some assets for the bankruptcy estate and, subsequently, when it appears that dividends will be available, to attempt to subordinate a claim to the claims of other creditors if facts come to his attention warranting such relief. This might well have been one of the considerations leading to the inclusion of Section 57(k) in the Bankruptcy Act because it expressly refers to the reallocation or rejection of claims previously allowed "in whole or in part *according to the equities of the case*" at any time before the estate is closed.

III.

The Banker's Lien Appeal Was From an Interlocutory Order in a Proceeding in Bankruptcy and, Therefore, Its Pendency Did Not Divest the Bankruptcy Court of Jurisdiction to Act on the Question of Subordination of the Bank's Claim.

A reading of the banker's lien order which is quoted in its entirety at the end of this Court's opinion herein shows that there was no amount fixed as the unsecured portion of the Bank's claim. Rather, the order provided that the total claim of the Bank was in a certain sum from which there should be deducted the items on which the Bank had exercised its lien and subject to further credit of the following amounts: (1) the proceeds from the sale of the real property on which the Bank held a deed of trust, and (2) the proceeds from the collections items which the Bank had not as yet collected. The last paragraph of the order repeated the requirement that the security be first liquidated by the provision that the Bank should be entitled to dividends "when the remainder of the security held by said claimant has been liquidated and the proceeds applied upon the unpaid balance of said claim." It is thus apparent that the exact amount of the Bank's unsecured claim could not be determined until all of the security was liquidated; in fact, there was even a possibility that the proceeds from the sale of the securities would have been sufficient to pay its claim in full. Such an order is interlocutory and this Court has so held in *Robinson v. Edler* (9th Cir., 1935), 78 F. 2d 817, 29 A. B. R. (N. S.) 502, which involved an order on a claim requiring the liquidation of securities very similar to that here involved.

The banker's lien order, being interlocutory, in order to have been appealable, must have arisen in a proceeding in bankruptcy as distinguished from a controversy arising in proceedings in bankruptcy, as those terms are used in Section 24 of the Bankruptcy Act. *Petersen v. Sampsell* (1948, 9th Cir.), 170 F. 2d 555; *In re Christ's Church of the Golden Rule* (1949, 9th Cir.), 172 F. 2d 523. The banker's lien appeal involved the Bank's right to apply against its claim the proceeds from the commercial paper upon which it asserted a banker's lien. That this is a proceeding necessarily follows from cases such as *McDaniel National Bank v. Bridwell* (1932, 8th Cir.), 74 F. 2d 311, 26 A. B. R. (N. S.) 748, in which the Court of Appeals for the 8th Circuit held that an order determining a bank-claimant's right to set off against its claim the balance in the bankrupt's account with the bank was a proceeding and not a controversy.

It is settled that the taking of an appeal from an interlocutory order in a proceeding in bankruptcy does not divest the bankruptcy court of jurisdiction to take further action in the matter. Thus, in *Matter of Woodruff* (1941, 9th Cir.), 121 F. 2d 152, 46 A. B. R. (N. S.) 567, this Court ruled that the bankruptcy court had jurisdiction to hear and determine the account and petition for compensation of the receiver and his attorneys, notwithstanding the fact that there was then pending in this Court an appeal from an earlier order of the bankruptcy court in the same proceeding, directing the receiver and his attorneys to petition for compensation and fees. This Court stated:

"Appellant contends that the California court had no jurisdiction to make the order of June 27, 1940, because, at that time, our mandate in *Jackson v.*

Lynch, supra, decided May 10, 1940, had not been issued. There is no merit in this contention. The orders reviewed in *Jackson v. Lynch, supra*, were not final judgments or decrees, but were interlocutory orders only. Consequently, the appeal therefrom did not remove the entire case to this court or preclude further proceedings in the court below. *Footte v. Parsons Non-Skid Co.* (C. C. A., 6th Cir.), 196 Fed. 951, 953. See also, *In Re F. P. Newport Corp.* (C. C. A., 9th Cir.), 37 A. B. R. (N. S.) 470, 475, 98 F. (2d) 453, 456. Much less were such proceedings precluded by a mere stay of mandate."

See also *Fernow v. Liberty Royalties Corp.* (1944, 10th Cir.), 146 F. 2d 396, 57 A. B. R. (N. S.) 659.

Bankruptcy proceedings are *sui generis* and cannot be compared to the ordinary type of civil litigation. As has already been indicated herein, Section 57(k) of the Act provides a clear recognition of the fact that judgments and orders in bankruptcy do not have the same finality as they have in the ordinary type of litigation. It is settled that the ordinary time limitations imposed by Federal Rules 59 and 60 pertaining to new trials and relief from judgments and orders do not apply to bankruptcy. See in this connection *Indemnity Insurance Co. v. Reisley* (2d Cir., 1946), 153 F. 2d 296, and the cases there cited as holding that orders in bankruptcy may be reconsidered at any time while the bankruptcy proceedings remain open.

See also:

Bailey v. Proctor (1st Cir., 1948), 166 F. 2d 392.

It is for this reason that non-bankruptcy cases such as *Rothschild & Co. v. Marshall* (9th Cir., 1931), 51 F. 2d 897, which was cited by this Court in its opinion, cannot be controlling in bankruptcy cases.

We respectfully submit that the foregoing principles as applied in the instant case would compel a holding that the pending banker's lien appeal did not divest the bankruptcy court of jurisdiction to entertain, hear and determine the receiver's petition to subordinate the claim of the Bank.

IV.

If the Banker's Lien Appeal Is Deemed to Have Divested the Bankruptcy Court of Jurisdiction to Act on a Petition for Subordination, This Court Should, by Its Mandate, Direct the Bankruptcy Court to Hear and Determine the Receiver's Amended Petition.

For the reasons hereinabove stated, we contend that the ruling of this Court that the banker's lien order determined the subordination question was erroneous. In any event, the language of this Court's opinion as it now stands, is ambiguous and should be clarified. This Court stated:

“We are persuaded that the last paragraph of said order decided the question of priority of the Bank's claim and the appeal took with it jurisdiction of the referee to act on that question.”

It is not clear whether or not the quoted sentence meant that the issue as to subordination was *res judicata* and, therefore, could never be reconsidered by the bankruptcy court or whether this Court meant merely that the bankruptcy court could not reconsider the ruling while the other appeal was pending. It would seem from a reading of this Court's entire opinion that the latter interpretation is correct for otherwise, there would have been no need for this Court to determine in appellant's favor all of the other issues involved on the appeal. Moreover, if the bank-

ruptcy court is without power to determine the receiver's petition upon the receipt of the mandate from this Court, Section 57(k) of the Bankruptcy Act will have been emasculated.

For this reason, if this Court adheres to its ruling as set forth in its opinion, the mandate should clearly set forth that the ruling does not preclude the bankruptcy court from hearing and determining the petition for subordination when the mandate comes back.

One of the cases cited by the Court suggests this procedure. In *Rogers v. Consolidated Rock Products Co.* (9th Cir., 1940), 114 F. 2d 108, 44 A. B. R. (N. S.) 59, the Court held that the bankruptcy court was without authority to consider a proposal for changes and modifications in a confirmed plan of reorganization by reason of the fact that at the time the proposal was made, there was an appeal pending in this Court from the order confirming the plan of reorganization. After stating that the trial court was without jurisdiction to proceed further with the matter pertaining to the plan of reorganization until it received the mandate of this Court, the Court went on to say:

“If a decree is entered pursuant to the mandate of an Appellate Court, proper deference to its authority requires that a proceeding to reopen it, whether by rehearing or review, should first be referred to that tribunal.”

Accordingly, request is hereby made, on behalf of the appellant, that this Court direct the bankruptcy court to treat the petition for subordination as a petition for reconsideration which it should proceed to hear and determine. The Court of Appeals for the First Circuit has

recently had occasion to express itself with respect to a procedure such as that here suggested. In *Bailey v. Proctor* (1948, 1st Cir.), 166 F. 2d 392, the question for decision was whether or not a reorganization court in bankruptcy had authority to hear and consider a petition to supplement or modify an earlier judgment rendered by the Court refusing to confirm a proposed plan of reorganization and ordering an immediate liquidation of the assets of the debtor. The earlier judgment had been appealed to the Court of Appeals for the First Circuit which had affirmed the ruling and the Supreme Court denied certiorari. After the mandate of the Court of Appeals came down a petition was filed in the bankruptcy court to supplement or modify the earlier order and it was denied. Thereupon, the proponents of the modification appealed to the Court of Appeals. On that appeal one of the contentions made in support of the ruling of the trial court was that the earlier ruling having been the subject of an appeal and having been affirmed, the reorganization court did not have the power to reconsider any question pertaining to the plan. The Court found it unnecessary to decide that question despite indications in its opinion that there was such power, at least upon the filing of the Circuit Court's mandate with the trial court. However, the Court went on to point out, as was suggested by this Court, in the case of *Rogers v. Consolidated Rock Products Co.*, *supra* (166 F. 2d at 396):

“We are inclined to think that the proper course of action would have been for the appellant to petition us for leave to file the new plan with the District Court for its consideration, if they felt the circumstances had so changed as to require a modification of that order.”

Although this procedure had not been followed, the Court, nevertheless, regarded the argument on appeal as in effect a petition to that Court, for leave to file a new plan with the District Court and went on not only to grant that leave, but to proceed to hear and determine the proposed new plan on its merits, stating (166 F. 2d at 397):

“We shall consider that point, treating the appellant’s prayer in this case as equivalent to a petition for leave to have the District Judge consider the question and granting the petition *nunc pro tunc*. Thus, we shall finally dispose of the case here of which the District Judge has power in the first instance.”

The Court thereupon approved the new proposed plan and directed the reorganization court to confirm it.

Bailey v. Proctor involved still another point. The contention was made that it was too late to seek a reconsideration of the earlier order and that therefore the “petition” was not timely. The Court answered this argument as follows (166 F. 2d at 397):

“The receivers also urge as an objection to granting the order the lateness of the proposal. They claim that the proposed plan should have been put forth at the time the various other plans were considered. Doubtless, the reason the appellants did not do so was that, upon advice of counsel, they thought at the earlier stage that the district court did not have power to order the payment of the debentures and the liquidation of the trust; and hence at that time it did not occur to them to propose the plan now in question, which contemplates continuance of the trust in the hands of those shareholders who choose not to withdraw, with all outstanding debentures paid off in full. Appellants proved to be mistaken in the legal

position they argued on the earlier appeal but their arguments were not unsubstantial or frivolous. There is a public interest in terminating the receivership as soon as may reasonably be done and in not allowing previous orders to be reopened continually. But since no one will be prejudiced by the modification of the liquidation order, as proposed, we do not think the plan should be rejected merely because of the delay due to the earlier appeal by these appellants on questions of law which were fairly litigable. As was said by L. Hand, J.: “* * * there can be considerations more imperative than the despatch of judicial business, even after delays * * *. If the legally protected interests of any opposing parties are fully preserved, it is not a good reason to deny others any reasonable chance to protect their own interests that they have been long in asserting them.’ *Knight v. Wertheim & Co.*, 2 Cir., 1946, 158 F. 2d 838, 844 certiorari denied sum nom. *McGuire v. Equitable Office Building Corporation*, 1947, 331 U. S. 818, 67 S. Ct. 1307, 1308.”

Such reasoning would determine any contention in the instant case that delay somehow precludes the granting of the relief requested.

There are other obvious answers in the instant case to any contentions that might be made by the Bank as to delay. In the first place, as pointed out by this Court in its opinion, the petition for subordination was filed by the receiver on July 30, 1948, the same day that the referee confirmed the plan of arrangement. At all times since that date the receiver has been pressing that petition and the Bank has not only been fully aware of his contention but has vigorously resisted it.

The ruling of this Court that the receiver's petition stated a cause of action and that the bankruptcy court (but for the appeal from the banker's lien order) had jurisdiction to hear and determine it will be reduced to the status of mere advisory opinions unless this Court makes it clear that the receiver is not foreclosed from proceeding upon his petition for subordination when the mandate of this Court is filed with the bankruptcy court. The receiver has alleged that all of the unpaid creditors of the debtor were misled and injured by the conduct of the Bank; equity and fairness, as well as Section (57k) of the Bankruptcy Act, require that the bankruptcy court determine those allegations.

Conclusion.

The bankruptcy court is a court of equity having broad equitable powers that endure so long as a bankruptcy estate remains open. The present estate is open. We respectfully contend for the reasons and upon the authorities hereinabove mentioned that the subordination issues could not have been determined in the banker's lien proceedings and that this Court's contrary ruling is erroneous. However, if this Court adheres to the position originally announced, the receiver hereby requests on behalf of the unpaid creditors in the within proceedings that this Honorable Court treat the appeal herein and this petition for rehearing as a petition seeking reconsideration of the Bank's claim under Section 57k of the Bankruptcy Act and that this Court direct the bankruptcy court to hear and determine the amended petition for subordination. As was pointed out in our original briefs, the receiver's amended petition was based upon facts obtained through further investigation and use of the dis-

No. 12499

United States
Court of Appeals
For the Ninth Circuit.

PENNSYLVANIA SALT MFG. CO., of Washing-
ton, a Corporation,

Appellant,

vs.

OSCAR VIRGIL HAYNES,

Appellee.

Transcript of Record

Appeal from the United States District Court
Western District of Washington,
Northern Division.

FILED

APR 25 1950

PAUL P. O'BRIEN, V.
CLERK

No. 12499

United States
Court of Appeals
For the Ninth Circuit.

PENNSYLVANIA SALT MFG. CO., of Washing-
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Appellant,

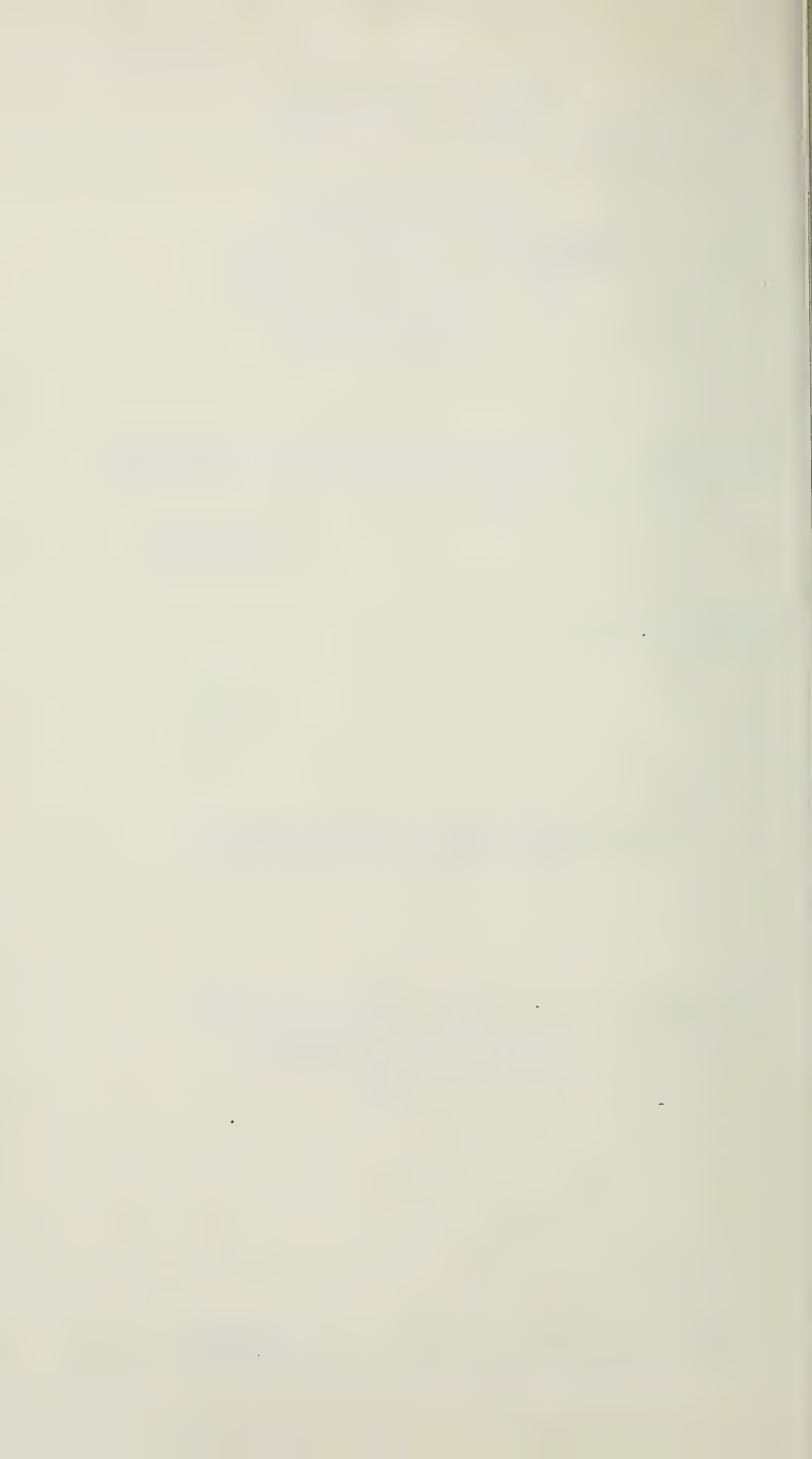
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In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 2096

OSCAR VIRGIL HAYNES,

Plaintiff,

vs.

PENNSYLVANIA SALT MFG. CO., of Washing-
ton, a Delaware corporation,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action
alleges as follows:

I.

That the defendant is a corporation organized
under the laws of the State of Delaware and as such
is a citizen of the State of Delaware. That the de-
fendant is qualified to do business in the State of
Washington as a foreign corporation, and that the
duly constituted and appointed resident agent of
the defendant in the State of Washington is Mar-
shall Chandler, residing in Seattle, King County,
State of Washington.

II.

That the plaintiff is an individual and a citizen
of the United States domiciled in the City of
Seattle, County of King, State of Washington, and
a citizen of the State of Washington.

III.

That the defendant is, and was at all times hereinafter mentioned, in the business of manufacturing chemicals and that at all times hereinafter mentioned, it maintained and operated a manufacturing plant in Tacoma, Washington, where it produced and processed chemicals. That at all times hereinafter mentioned and for several years prior thereto the defendant, in the manufacturing and processing of chemicals in its said plant in Tacoma, Washington, through its employees, handled many chemicals capable of causing burns and severe injuries to persons coming in contact with the said chemicals. That in the maintenance of its chemical manufacturing plant the defendant, at all times hereinafter mentioned and for several years prior thereto, used a great deal of iron pipes of various forms and sizes through which the defendant ran various types of chemicals in the manufacturing and processing of chemicals. That as said pipes became worn, they were discarded as a part of the defendant's manufacturing and operating system and replaced by other pipes.

IV.

That during February, 1948, the defendants sold certain scrap iron to Frank Powser of Tacoma, Washington. That included among the scrap iron sold to Frank Powser of Tacoma, Washington, was a large coil of pipe which the defendant had discarded from its operating system. That during

February, 1948, employees of Frank Powser went to the Tacoma, Washington, plant of the defendant to accept delivery of the scrap iron sold to Frank Powser. That an employee of the defendant, acting in the course and scope of his employment, delivered the scrap iron, which had been sold to Frank Powser, including the said coil of pipe, to employees of Frank Powser, who then loaded the scrap iron, including the said coil of pipe onto a truck which they had brought for that purpose, and transported it to the salvage yard of Frank Powser in Tacoma, Washington. That upon arrival at the salvage yard of Frank Powser, the scrap iron, including the said coil of pipe, was deposited in the Powser yard. That at all times herein mentioned, the said coil of pipe contained a corrosive chemical substance, which the plaintiff believes was sulphuric acid. That neither the defendant nor any of his employees knew that the said coil of pipe contained said corrosive chemical substance.

V.

That on the 20th day of February, 1948, the plaintiff was employed in the capacity of a truck driver by B. Radinsky & Son, salvage dealers, of Seattle, Washington. That in the course of his employment, the plaintiff, from time to time, was directed by his employer to proceed to various places to transport scrap metals from the said localities to the salvage yard of B. Radinsky & Son located in Seattle, Washington. That on February

20, 1948, plaintiff was directed by his employer to proceed to the salvage yard of Frank Powser in Tacoma, Washington, to pick up a load of scrap iron and scrap pipe. That the plaintiff, in a truck owned by his employer, proceeded to the salvage yard of Frank Powser as directed and after arriving there, was shown by employees of Frank Powser, the scrap iron and scrap pipe which he was to load on his truck and transport to his employer's yard in Seattle. That among the scrap iron to be loaded was the said coil of pipe hereinbefore mentioned. That the said coil of pipe was lying on the ground in the salvage yard of Frank Powser in the same place and in the same position as it had been when first deposited in the said yard by employees of Frank Powser at the time that they had transported it from the defendant's manufacturing plant, as hereinbefore set forth. That the plaintiff was at all times unaware that the said coil of pipe contained a corrosive substance. That by means of a hoist, the plaintiff loaded said coil of scrap pipe from the ground onto the truck which he had driven to the Powser yard for the purpose of transporting said scrap iron. That for the purpose of placing the said coil of pipe in a proper position on the truck and in order to move it a few inches, the plaintiff, using a maul, pounded on said pipe when, without warning or notice to the plaintiff, a seam in said pipe opened and a pressurized stream of the corrosive chemical substance which was in the said coil of

pipe issued from the said coil of pipe and struck the plaintiff on the face, arms, neck and eyes and covered a large portion of his clothing. That the force with which the corrosive chemical substance spewed from the said coil of pipe knocked the plaintiff from the truck to the ground. That the plaintiff was immediately rushed to the Tacoma Hospital, Tacoma, Washington, where he was forced to remain for two months and two days.

VI.

That the said corrosive chemical substance which issued from the said coil of pipe as hereinbefore set forth, upon coming into contact with the plaintiff's eyes, burnt them to such an extent that the plaintiff has suffered complete loss of vision in the left eye and almost total loss of vision of the right eye; and upon coming in contact with the rest of plaintiff's person, caused severe burns which have resulted in multiple scars, disfiguring the greater portion of plaintiff's face and neck and a portion of his arms. That the said injuries to the plaintiff have caused, and are still causing, the plaintiff excruciating pain and extreme mental anguish and suffering. That the scars on plaintiff's face and body are extremely tender and continue to reopen, causing him continuous pain. That the plaintiff has been receiving medical treatment since the said injuries. That it will be necessary for him to receive medical treatment for an indefinite period. That the said injuries were caused by and are a

direct and proximate result of the negligence of the defendant and its employees.

VII.

That the said negligence of the defendant consisted of the following:

a. Failing to ascertain that all corrosives and substances injurious to other persons upon contact had been removed from said coil of pipe or neutralized before allowing said coil of pipe to be removed from the premises of the defendant to be placed as scrap metal into the stream of commerce where it was certain to be handled by other persons unaware of its dangerous propensities.

b. Failing to remove all corrosives and substances injurious to humans from said coil of pipe immediately upon removing said coil of pipe from its operating system.

c. Selling and delivering a coil of pipe containing a corrosive substance highly injurious to other persons upon contact, without having warned the persons to whom the said pipe was sold and delivered, of the presence of dangerous substances in said coil of pipe.

VIII.

That prior to the injuries sustained by plaintiff as a result of defendant's negligence, as hereinbefore set forth, the plaintiff was a strong and able bodied man in good health with excellent vision, earning and capable of earning the sum of \$300.00

per month. That as a direct and proximate result of the negligence of the defendant as above set forth, the plaintiff has become totally and permanently disabled. That as a result of the negligence of the defendant above set forth, the plaintiff has suffered damages in the sum of \$250,000.00.

IX.

That plaintiff has been forced to expend for medical services, and is still being treated by doctors for his injuries, and will be forced to expend large sums in the future for medical and hospital bills.

Wherefore, plaintiff prays for judgment against the defendant as follows:

1. For damages in the sum of \$250,000.00 against the defendant, Pennsylvania Salt Manufacturing Co. of Washington, a Delaware corporation.
2. For such hospital and medical bills as may be proven at the trial.
3. For his costs and disbursements incurred in this action.

MASLAN & MASLAN,
By /s/ A. L. MASLAN,
Attorneys for Plaintiff.

Plaintiff respectfully demands a jury trial having elected to have his case tried by a jury.

/s/ A. L. MASLAN.

[Endorsed]: Filed September 15, 1948.

[Title of District Court and Cause.]

STIPULATION ALLOWING AMENDMENT
TO COMPLAINT

It is hereby stipulated by and between the parties hereto through their respective counsel of record that the following sentence in Paragraph IV of plaintiff's complaint, reading as follows:

“That neither the defendant nor any of his employees knew that the said coil of pipe contained said corrosive chemical substance.

be deemed amended to read:

“That neither the said Frank Powser, nor any of his employees knew that the said coil of pipe contained said corrosive chemical substance.”

and that defendant's answer to said Paragraph IV be deemed amended to deny said amended allegation for want of sufficient knowledge or information.

MASLAN & MASLAN,

By /s/ A. L. MASLAN,

Attorneys for Plaintiff.

PRESTON, THORGRIMSON &
HOROWITZ,

/s/ FRANK M. PRESTON,

Attorneys for Defendant.

[Endorsed]: Filed November 26, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for answer to the complaint of the plaintiff herein admits, denies, and alleges as follows:

I.

Answering paragraphs I and II of said complaint, defendant admits the allegations therein contained.

II.

Answering the allegations of paragraph III of said complaint, the defendant admits that at all times mentioned in the complaint, it maintained and operated a manufacturing plant in Tacoma, Washington, and that in the operation of said plant it used iron pipes and that as said pipes became worn they were discarded and replaced, but the defendant denies each and every other allegation contained in said paragraph.

III.

Answering paragraph IV of said complaint, the defendant admits that during February, 1948, it sold certain scrap iron to Frank Powser of Tacoma, Washington, including a large coil of pipe which the defendant had discarded from its operating system, and further admits that an employee of the defendant delivered said scrap iron, including said coil of pipe, to employees of said Frank Powser

at the plant of the defendant, and further admits that neither the defendant nor any of its employees knew that the said coil of pipe contained any corrosive chemical substances, but the defendant does not have any knowledge or information concerning the disposition or whereabouts of the said scrap iron or coil of pipe after the same left the defendant's plant.

IV.

Answering paragraph V of said complaint, the defendant admits that on and prior to the date therein mentioned the plaintiff was employed in the capacity of a truck driver by B. Radinsky & Son, salvage dealers of Seattle, Washington, and that on or about said day the plaintiff was directed by his employer to pick up a load of scrap iron and scrap pipe at the salvage yard of Frank Powser in Tacoma, Washington, and further admits that the plaintiff proceeded to said salvage yard of Frank Powser as directed, in a truck owned by his employer, and further admits that while in the act of loading the coil of scrap pipe which had been acquired by the said Frank Powser from the defendant as aforesaid, the plaintiff sustained injuries, the scope and extent of which are unknown to the defendant, but the defendant has no knowledge or information sufficient to form a belief as to the other allegations contained in said paragraph V and therefore denies the same.

compensation and industrial insurance. (R.R.S. 7675.)

And for a Further and Second Affirmative Defense to the cause of action set forth in the plaintiff's complaint, the defendant alleges:

I.

That any injuries which may have been sustained by the plaintiff as a result of the handling of the aforesaid coil of pipe were directly and proximately contributed to by plaintiff's own negligence and carelessness.

Wherefore, the defendant having fully answered plaintiff's complaint, prays that the plaintiff's action be dismissed, that the plaintiff take nothing herein, and that the defendant have judgment against the plaintiff for the costs and disbursements of this action.

PRESTON, THORGRIMSON &
HOROWITZ,
/s/ FRANK M. PRESTON,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 18, 1949.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED
INSTRUCTIONS

Comes now the defendant and requests the court to instruct the jury in writing as follows:

PRESTON, THORGRIMSON &
HOROWITZ,
/s/ FRANK M. PRESTON,
Attorneys for Defendant.

Instruction No.

Members of the Jury:

You are instructed to return a verdict into court in favor of the defendant.

Instruction No.

You Are Instructed that the gist of this action is alleged negligence on the part of the defendant. Plaintiff is not entitled to recover against defendant merely because an accident has caused him injuries, but must prove by a fair preponderance of the evidence in the case that the defendant was negligent in one or more of the particulars charged in plaintiff's complaint, and that such act or acts of negligence was a proximate cause of the accident in question and the resulting injuries to plaintiff, failing in which your verdict must be for the defendant.

Instruction No.

By the term "proximate cause" of an event is meant that cause which in a natural and unbroken sequence produces the event and without which such event would not have occurred. Thus an injury that is the natural and probable consequence of an act of negligence is the proximate result of such act, but such act is not the proximate cause of an injury which could not have been foreseen or reasonably anticipated as the probable result of the act.

Instruction No.

You are instructed that if you find from a preponderance of the evidence in the case that the plaintiff in striking the pipe coil in question with a maul did not use reasonable care in so doing for his own protection and well-being, and that such failure on his part directly and proximately contributed to cause the accident and his resulting injuries, then plaintiff cannot recover and your verdict must be for the defendant, regardless of whether or not the defendant was also negligent.

Instruction No.

You are instructed that the plaintiff, in order to prevail in this action must prove by the evidence or reasonable inference therefrom that defendant was negligent in one or more of the particulars charged in plaintiff's complaint.

If in order to find an act of negligence on the

part of defendant you are required to resort to speculation, surmise, or conjecture, then plaintiff cannot recover, and your verdict must be for the defendant.

Instruction No.

You are instructed that if you find from the evidence that the defendant could not reasonably have foreseen that any person handling, moving, or supporting said coil of pipe would use a maul or hammer to strike the same and break a hole therein, and if you further find that the proximate cause of the plaintiff's injuries was the striking of a hammer or maul upon the coil of pipe, then your verdict must be for the defendant.

Instruction No.

You are instructed that if you find from the evidence that the injuries to the plaintiff would not have occurred if the plaintiff had not attempted to knock off a protruding T connection on the coil of pipe with a hammer or maul, and if you find that the striking of the hammer or maul on the coil of pipe was the act which proximately and directly caused the injuries, then your verdict must be for the defendant.

Instruction No.

You are instructed that if you find from the evidence that at the time of the delivery of the coil of pipe to employees of Frank Powser, the em-

ployees of the defendant did not know of the existence of any dangerous or injurious substance contained in said pipe, and if you find from the evidence that in the exercise of ordinary care the defendant's employees would not have known of the presence of any such injurious substance, then your verdict should be for the defendant.

[Endorsed]: Filed November 23, 1949.

District Court of the United States, Western
District of Washington, Northern Division

No. 2096

OSCAR VIRGIL HAYNES,

Plaintiff,

vs.

THE PENNSYLVANIA SALT MFG. CO. of
Washington, a Delaware Corporation,
Defendant.

VERDICT

We, the jury in the above-entitled cause, find for the plaintiff and against the defendant and assess plaintiff's amount of recovery in the sum of (\$35,000.00) Thirty-Five Thousand no/100 Dollars.

/s/ WALTER B. LATIMER,
Foreman.

[Endorsed]: Filed November 25, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL OF ONE ISSUE

Comes now the defendant above named and moves the court herein for a new trial of the issue, and solely of the issue, raised by defendant's first affirmative defense in its answer on file herein, to wit: the right of plaintiff to maintain this action under Section 7675 of Remington's Revised Statutes of Washington.

The grounds assigned for this motion are as follows:

1. Error on the part of the trial court in granting plaintiff's motion to strike first affirmative defense of defendant's answer, thereby withdrawing the issue from consideration of the jury.

2. Error on the part of the trial court in excluding proof offered by defendant in support of the allegations of its said first affirmative defense.

PRESTON, THORGRIMSON &
HOROWITZ,

/s/ FRANK M. PRESTON,

Attorneys for Defendant.

The foregoing motion for new trial is hereby denied.

Done in open Court this 12th day of December, 1949.

/s/ JOHN C. BOWEN,

Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed December 12, 1949.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2096

OSCAR VIRGIL HAYNES,

Plaintiff,

vs.

PENNSYLVANIA SALT MFG. CO. of Wash-
ington, a Delaware Corporation,

Defendant.

JUDGMENT

This matter having come on regularly for trial before the Hon. John C. Bowen, Judge of the above entitled Court, the plaintiff appearing in person and through his attorneys, Maslan, Maslan & Hanan and the defendant appearing through its attorneys, Preston, Thorgrimson & Horowitz (by Frank Preston and Edward Starin of counsel), and the jury having been duly paneled and sworn and witnesses having been sworn, and evidence having been heard and the jury having returned a verdict in open Court in favor of the plaintiff for \$35,000.00, and the Court having directed judgment upon the verdict to be entered forthwith by the clerk of said Court and the said judgment having been entered in the civil docket of the Court on November 28, 1949, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plain-

tiff, Oscar Virgil Haynes have and recover judgment against the defendant, Pennsylvania Salt Mfg. Co. of Washington, a Delaware corporation, in the sum of \$35,000.00, with interest thereon at the legal rate from the 28th day of November, 1949.

It is further Ordered, Adjudged and Decreed that plaintiff have and recover his costs herein to be taxed by the Court.

To all of which defendant excepts and its exceptions are hereby noted.

Done in open Court this 12th day of December, 1949.

/s/ JOHN C. BOWEN,
Judge.

Presented and approved by
ALBERT HANAN,
Of MASLAN, MASLAN & HANAN,
Attorneys for Plaintiff.

Approved as to form:

.....

Of Preston, Thorgrimson & Horowitz, Attorneys for
Defendant.

Receipt of copy acknowledged.

Entered in Civil Docket December 12, 1949.

[Endorsed]: Filed December 12, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS

To: The Clerk of the above entitled Court, the plaintiff above named and to Maslan, Maslan and Hanan, his attorneys:

Notice is Hereby Given that the Pennsylvania Salt Mfg. Co., of Washington, a Delaware corporation, the defendant above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 12, 1949.

/s/ FRANK M. PRESTON,
PRESTON, THORGRIMSON &
HOROWITZ,

Attorneys for Appellant Pennsylvania Salt Mfg.
Co. of Washington, a Delaware corporation.

[Endorsed]: Filed December 23, 1949.

[Title of District Court and Cause.]

APPEAL BOND

Known All Men by These Presents, That Pennsylvania Salt Mfg. Co. of Washington, a Delaware Corporation, as Principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York and duly authorized to do a surety business in the State of Washington, as Surety, are held and firmly bound unto Oscar Virgil Haynes, the above named Plaintiff, in the full and just sum of Two Hundred Fifty and no/100 (\$250.00) Dollars to be paid to the said Oscar Virgil Haynes, his heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and Dated this 23rd day of December, 1949.

Whereas, lately at a regular term of the District Court of The United States for the Western District of Washington, Northern Division, in a suit pending in said Court between Oscar Virgil Haynes, as Plaintiff, and Pennsylvania Salt Mfg. Co. of Washington, being cause No. 2096 on the law docket of said Court, judgment was rendered against the said Pennsylvania Salt Mfg. Co. of Washington, a Delaware Corporation, and

Whereas, the said Pennsylvania Salt Mfg. Co. of Washington has been allowed an appeal

Now, The Condition of the Above Obligation Is Such,

That if the said Pennsylvania Salt Mfg. Co. of Washington shall pay all costs and expenses which may be awarded against it, then the above obligation to be void; otherwise to remain in full force and effect.

PENNSYLVANIA SALT MFG.
CO. OF WASHINGTON, a
Delaware Corporation.

By PRESTON, THORGRIMSON &
HOROWITZ,

Its Attorneys.

AMERICAN SURETY COM-
PANY OF NEW YORK,

By /s/ J. A. HODSON,
Resident Vice Pres.

Attest:

[Seal] /s/ M. WEYER,
Resident Asst. Secretary.

[Endorsed]: Filed December 23, 1949.

[Title of District Court and Cause.]

ORDER ENLARGING TIME TO FILE
TRANSCRIPT OF RECORD ON APPEAL

This matter coming on before the court on application of the defendant Pennsylvania Salt Mfg. Co. for an order enlarging and extending the time for

filing the record on appeal and docketing this cause with the Clerk of the U. S. Court of Appeals for the Ninth Circuit, the applicant appearing by its attorneys, Frank M. Preston, Esq., and Preston, Thorgrimson & Horowitz, and it appearing that due and timely notice of said application was given to Messrs. Maslan, Maslan & Hanan, attorneys for the plaintiff herein; and it further appearing to the court from the records and files herein that notice of appeal was filed in this cause on December 23, 1949; and it further appearing that good cause exists for extending and enlarging the time for filing the record on appeal and docketing the same with the clerk of the U. S. Court of Appeals for the Ninth Circuit, and the court being fully advised in the premises,

It Is Hereby Ordered that the time for filing the record on appeal and docketing the same in the above entitled cause be, and the same is hereby extended to and including March 15, 1950.

Done in open court this 6th day of January, 1950.

/s/ JOHN C. BOWEN,

Judge.

Presented by:

/s/ EDWARD STARIN,

Of Counsel for Defendant.

[Endorsed]: Filed January 6, 1950.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2096

OSCAR VIRGIL HAYNES,

Plaintiff,

vs.

PENNSYLVANIA SALT MFG. CO. of Washing-
ton, a Delaware Corporation,

Defendant.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Seattle, Washington; November 22, 1949
10 o'Clock A.M.

Appearances:

A. L. Maslan, Ben Maslan and Albert Hanan,
Maslan, Maslan & Hanan, appearing for and on
behalf of plaintiff.

Frank M. Preston and Edward Starin, Preston,
Thorgrimson & Horowitz, appearing for and on be-
half of defendant.

Whereupon, a jury having been duly impanelled,
and opening statement made on behalf of plaintiff,
the following proceedings were had and done, to
wit:

The Court: Call plaintiff's first witness.

GEROLD WALTERS

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [2*]

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Gerold Walters.

Q. What is your occupation?

A. I am a photographer.

Q. Where are you located in the city of Seattle?

A. 310—Fourth and Pike Building.

Q. Is that your business? A. Yes.

Q. What is the name of the business?

A. Walters Studio.

Q. Are you associated with anyone?

A. Yes, with my father.

Q. Do you recall, Mr. Walters, on or about the 6th day of July, 1948, when you took certain pictures? A. Yes.

Q. In whose company were you when you took these pictures?

A. I was in your company.

Q. Where were those pictures taken?

A. Right near Tacoma at a junk yard.

Q. Did you take the pictures of any particular object?

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Testimony of Gerold Walters.)

A. Yes, there was a piece of a sort of pipe on the ground and we photographed that pipe. [3]

Q. And these pictures were taken in my presence, Mr. Walters? A. Yes.

(Photographs marked Plaintiff's Exhibits 1, 2, 3 and 4 for identification.)

Q. Referring to Exhibits 1, 2, 3 and 4, did you take those pictures? A. Yes.

Q. What do they represent?

A. A picture of the pipes that were lying on the ground in this yard.

Mr. A. L. Maslan: I offer those in evidence, may it please the Court.

Mr. Preston. We object at this time, Your Honor. There is no connection shown yet between these photographs.

The Court: The Court will hear further testimony identifying them.

Q. On the same day, did you have occasion to take any pictures of this lad here? Will you stand up, Oscar? A. Yes.

Q. What day was that?

A. The same day that these pictures were taken. [4]

Q. You stated that was July 6, 1948?

A. July 6, 1948, that's right.

(Photographs marked Plaintiff's Exhibits 5 and 6 for identification.)

(Testimony of Gerold Walters.)

Q. And you state those pictures were taken the same date as you took the other pictures?

A. Yes, sir.

Q. What date was that again?

A. July 6, 1948.

Q. Those are of this young man here?

A. Yes.

Mr. A. L. Maslan: I offer those in evidence, may it please Your Honor.

The Court: Plaintiff's Exhibits 5 and 6 are now admitted.

(Plaintiff's Exhibits 5 and 6 received in evidence.)

The Court: They may be passed now or later to the jury. You will have an opportunity to do that at any time.

Mr. Ben Maslan: I wonder if they may be passed at this time, Your Honor.

The Court: You may do that. The jury is given an [5] opportunity to have a view of these at this time, having in mind that you will later have an opportunity to study them in greater detail at your own leisure and convenience in the course of your deliberations in the jury room.

At this time, you should pass them along promptly so as not to unnecessarily delay the trial proceedings at this moment. Pass them along as promptly as you can after getting a view of the objects shown in the photographs.

(Testimony of Gerold Walters.)

Q. Mr. Walters, at the time you took the pictures of Oscar Haynes, did you have occasion to observe the physical condition of the young man at that time, that is, the facial condition?

A. Of course, he looked very bad, and I didn't know any of the circumstances of——

The Court: Never mind that. Just say what your eyes reflected to your mind about his appearance.

The Witness: He looked very bad. He had been burned.

Mr. Preston: I object to that.

The Court: The objection is sustained. If you saw something on his face, you can say what you saw on his face.

Q. Do those pictures accurately represent the physical [6] condition of the plaintiff as you observed him on the day you took the pictures?

A. At the time I took the photographs, yes. They are not retouched, just a raw negative was made, and a print made from that negative without any retouching on it.

The Court: That is sufficient. Have in mind the form of the question and answer that. If counsel wishes to go further, he may inquire.

Q. As you observed his face, did you notice any matter or material exuding from any scars or sores on the face at that time?

A. Well, frankly——

The Court: Can't you say yes or no, and then

(Testimony of Gerold Walters.)

he may ask you another question? Can't you say yes or no to that question? Read the question.

(Last question read by reporter.)

Mr. Preston: It is leading and suggestive, if the Court please.

The Court: The objection is overruled, with direction to the witness to answer either yes or no, according as he knows the fact to be.

The Witness: No.

Q. Mr. Walters, do you recall the pictures that you took of the pipe on July 6, 1948?

A. Yes. [7]

Q. Did you subsequently take any other pictures of the same pipe? A. Yes.

Q. Is there any reason why you took the later pictures?

A. In the first pictures that were taken, grass seemed to be grown around the pipe quite a bit, and so we thought it would be better to take some newer pictures, and perhaps get a better view without as much grass around the pipe, and showing it off to better advantage.

Q. Did you then take some pictures?

A. Yes.

Q. When did you take them?

A. They were taken yesterday.

Q. Where were they taken?

A. At the same place, near Tacoma, at this junk yard.

(Testimony of Gerold Walters.)

Q. And is that the Frank Powser Junk Yard where you were before with me?

A. That's right.

(Photographs marked Plaintiff's Exhibits 7, 8, 9 and 10 for identification.)

Q. Are those the pictures that you took yesterday? A. Yes. [8]

Q. Do those represent the pipe as you saw the said pipe yesterday? A. Yes.

Mr. A. L. Maslan: I offer those in evidence.

Mr. Preston: Objection.

Mr. A. L. Maslan: We will connect them up later.

The Court: The Court will reserve ruling.

Mr. A. L. Maslan: Take the witness.

Mr. Preston: No questions.

The Court: You may step down.

(Witness excused.)

The Court: Call plaintiff's next witness.

Mr. A. L. Maslan: Frank Powser.

FRANK POWSER

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

(Testimony of Frank Powser.)

A. My name is Frank Powser.

Q. Where do you live? [9]

A. I live at 315 North Yakima, Tacoma.

Q. What is that address?

A. 315 North Yakima, Tacoma.

Q. What business are you in?

A. I am in the junk business.

Q. And what does that entail, the junk business?

A. Scrap iron, rags, and so on, metal and all down the line.

Q. Where do you do business, primarily?

A. I do business at Reynold and Lincoln Avenues, Tacoma.

Q. What type of plant or operation do you have?

A. I buy and sell. I sell all over and buy scrap and sell it all over.

Q. Did you ever have occasion to purchase any scrap iron from the Pennsylvania Salt Company?

A. Yes, I did.

Q. Do you recall ever having purchased any scrap iron from the Pennsylvania Salt Company during the month of February, 1948?

A. Yes, I did.

Q. Do you recall the date of the accident, Mr. Powser, wherein Oscar Haynes was injured?

A. That was the 20th day of February.

Q. 19 what? [10] A. 48.

Q. In relation to that date, do you recall approximately when you purchased scrap iron from the Pennsylvania Salt Company?

(Testimony of Frank Powser.)

A. It was about three weeks before I sold it.

Q. And to whom did you sell that scrap iron?

A. I sold that to Radinsky & Son, Seattle.

Q. How did you happen to buy this scrap iron from the salt company?

A. They called me on the telephone to come down and look at it, and I bought it.

Q. How did you buy it? Was it by bid or just outright purchase?

A. According to the city scale, according to weight.

Q. Do you recall the contents of the scrap iron that you purchased during that month? You stated you made the purchase three weeks before?

A. Yes.

Q. Will you tell the jury what the contents of that scrap were?

A. It was old pipes and scrap iron, it was pipe, scrap pipe, and naturally it was iron.

Q. Handing you Plaintiff's Exhibits 1, 2, 3 and 4 and Plaintiff's Exhibits 7, 8, 9 and 10, would you look at Plaintiff's Exhibits 1, 2, 3 and 4 first, and would you tell [11] the Court and jury what those pictures represent?

A. That is the coil I purchased from the Penn. Salt Company.

Q. And would you look at all those pictures, 1, 2, 3, and 4? A. Yes, that is the same coil.

Q. Do they represent different features or aspects of that pipe?

(Testimony of Frank Powser.)

A. They do, because the first picture was taken, there was lots of grass around it.

The Court: He is looking only at two of the pictures.

Q. Will you look at 3 and 4 please?

A. Yes, that is the same coil.

Q. Would you look at 4?

A. Yes, that is the same coil.

The Court: What is the word you used, coil?

The Witness: Coil.

Q. When you mentioned the word Penn. Salt Compay, do you mean the Pennsylvania Salt Manufacturing Company?

A. Well, I call it Penn. Salt. That is the only way—the name I got for them, and that is what I call them.

Q. Do you know whether Penn. Salt Company and Pennsylvania Salt Manufacturing Company are one and the same firm? [12]

A. I don't know.

Q. You don't know that yourself? A. No.

Q. Where is the Penn. Salt Company, Mr. Powser? A. It is down on the tide flats.

Q. Is it located in Tacoma also?

A. In Tacoma, down in the tide flats.

Q. Would you look at Exhibits 7, 8, 9 and 10, and tell the Court and jury what those pictures show? A. That shows the same coil.

Q. You heard the testimony that the pictures of that coil were taken yesterday?

(Testimony of Frank Powser.)

A. Yes, I did.

Q. And do those pictures represent the position the pipe is in at the present time?

A. They do.

Q. And do those pictures represent the pipe which was purchased by you in that scrap iron during the early part of February, 1948?

A. Yes, it does.

Q. And do those pictures show the pipe from which this material spewed forth and injured Oscar Haynes?

A. Yes, sir.

Mr. A. L. Maslan: I offer those pictures in evidence. [13]

Mr. Preston: May I question the witness?

The Court: You may, upon voir dire.

Mr. Preston: Mr. Powser, when did you first see this pipe that is shown in these exhibits?

The Witness: The first I saw that pipe, at the Penn. Salt Yard.

Mr. Preston: You saw them at the yard?

The Witness: Yes, sir.

Mr. Preston: You went there yourself?

The Witness: I was called, and I come down and looked at it, at the pipe.

Mr. Preston: And you saw these pipes that are shown in the exhibits?

The Witness: Yes, I did.

Mr. Preston: And recognize it?

The Witness: Recognize it, yes.

Mr. Preston: And recognize it as such——

(Testimony of Frank Powser.)

The Witness: Recognize it, yes.

Mr. Preston: —as such in these pictures?

The Witness: Yes, I do.

The Court: Each of these exhibits, namely, Plaintiff's Exhibits 1, 2, 3, 4, 7, 8, 9 and 10 is now admitted.

(Plaintiff's Exhibits 1, 2, 3, 4, 7, 8, 9 and 10 received in evidence.) [14]

Q. Mr. Powser, do you recall the morning, approximately close to 12:00 o'clock, when Oscar Haynes, together with his associate, Huston Hubbard, came to your yard to pick up some scrap iron?

A. Yes, sir.

Q. Would you tell the Court and jury what that scrap iron consisted of, the scrap iron that these two boys were to pick up?

A. The pipe and scrap and general scrap iron, that is the only way I can describe it to you.

Q. Did that include this pipe that you just testified about?

A. Yes, sir, it included that pipe.

Q. Where was that pipe located as far as your yard was concerned?

A. It was laying right in my yard.

Q. How long had it been there before Oscar Haynes attempted to move it?

A. A couple of weeks.

Q. And that was the pipe you bought from the Pennsylvania Salt Company? A. That's right.

(Testimony of Frank Powser.)

Q. Would you tell the Court what Oscar Haynes proceeded to do, as far as you yourself saw?

A. Well, I didn't see anything, just I was standing [15] talking to him.

The Court: Wait just a moment and think of the last question. Do not say something that is not called for in this question. Say what this question calls for, insofar as you know the answer.

The Witness: He was proceeding to loading that scrap.

Mr. A. L. Maslan: I have to go back another question or two, will Your Honor excuse me?

The Court: You may do that.

Q. How did you get that pipe to your yard?

A. Well, I load that pipe on my truck at the Penn. Salt and unloaded it in my yard, brought it down over to my yard with my truck.

Q. Who did that?

A. Mr. Russell and Mr. Miller.

Q. Were you on the truck, too?

A. No, sir, I wasn't on the truck.

Q. At that time was Mr. Russell working for you? A. Yes, sir.

Q. Was Mr. Miller working for you?

A. He just come up, he wasn't working steadily. He just come up and I give him work in odd times.

Q. You gave him odd jobs?

A. Pardon, he wasn't working for me, I got ahead of [16] my time. At the time I took the coil

(Testimony of Frank Powser.)

from the Penn. Salt—ask me the question again, if you please?

Q. At the time you took the pipe from the Penn. Salt, who removed it from the Penn. Salt?

A. Mr. Miller and Mr. Russell.

Q. And were you there, too?

A. They moved it over to my yard.

Q. Was the pipe in the same condition on the 20th day of February as on the day that you removed it from the Pennn. Salt Company?

A. Yes, it was.

Q. Did you tamper with the pipe in any way?

A. No, I didn't.

Q. Did you have occasion to touch it or move it in any way?

A. We just unloaded it out of my truck and left it lay in the yard, and the Radinsky truck come up and they loaded the pipe in the Radinsky truck.

Q. Would you state what happened when Oscar proceeded to load the pipe onto his truck?

A. The only thing, my back was turned to him at that time, I looked at him, I was talking to the man in my yard, I heard all of a sudden a scream and, "I'm blind, I'm blind, take me to the doctor," so I grabbed him and put him in the car and what's-his-name, his associate, went with me, [17] holding his hands, and I took him down to the General Hospital just as quick as I could.

Q. Who do you mean by, "what's-his-name"? Is that Huston Hubbard?

A. Yes.

(Testimony of Frank Powser.)

Q. When you heard him say, "I'm blind" where was he?

A. He was about ten feet away from me, but my back was turned when this happened. I don't know how it happened or anything about it. I just heard, "Take me to the doctor, I'm blind, I'm blind" and so I put him in my car and went as fast as I could to Tacoma General Hospital.

Q. Was he in the truck when you first saw him after he screamed?

A. No, he jumped off the truck. He was on the ground, rather.

Q. Did you notice what foreign material was on him?

A. It was kind of a white stuff.

Q. Did you have occasion to touch that yourself?

A. Never did. I touched it myself, yes, when I took him down to the hospital, I got it on my hands, and on my dash.

Q. What happened to your hands and the dash?

A. It kind of burned my hands and burned the paint off the dash.

Q. Do you know how long it was on the dash to do that? [18]

A. It was there about—when I got out of the hospital, I looked and my dash, the paint was burned off.

Q. What happened when you took him to the hospital?

A. I took him to the hospital and the nurses,

(Testimony of Frank Powser.)

they took him in the dressing room and they called a doctor and they started working on him.

Q. What's that?

A. They put him in a dressing room and called a doctor, and that's all I know.

Q. When you first saw him on the ground, did he appear to you to be in pain?

A. He was in terrific pain.

Q. Would you describe that as best you can?

A. The only thing I know, my back was turned toward him, I looked back toward him and he got ahold of his eyes, he says, "please take me to the doctor, I'm blind, I'm blind" so his associate fellow working with him, we put him in the car, of course there was excitement, I don't know just what happened. We took him there, put him in the car and took him right up to Tacoma General.

Q. Was he in pain all during this trip?

A. Yes, he was.

Q. Did you notice what Huston Hubbard was doing when you were driving the boy to the hospital?

A. He hold his hands so he don't rub his eyes, because I was afraid he cut his eyes all up, and this gentleman hold his hands, and I took him over to the hospital.

Q. Did you have occasion to notice how his face looked when you were driving him to the hospital?

A. Well, it looked pretty bad. I didn't have a chance to look at his face when I was driving, but

(Testimony of Frank Powser.)

when I got him to the hospital, I looked at it. It was pretty bad. Then I left.

Q. What do you mean, pretty bad? What were the physical characteristics of the face?

A. The skin was burned, it was pretty bad shape.

Q. Was he bleeding at that time, if you remember? A. I don't remember now.

Q. Did you have occasion to see him at the hospital on any later occasions?

A. Yes, I used to come and visit about once a week, went up to see him.

Q. Did you notice how he looked when you first saw him in the hospital the first week?

A. He was all bandaged up and he was awfully—his face was—his eyes were shut, and you can't hardly see the face. It was all bandaged up.

Q. During that time, did he appear to you to be in pain? A. Yes, he was. [20]

Q. After he was in the hospital? A. Yes.

Q. At any time after you got the pipe and until the time of the accident, did you know that this pipe contained any caustic material of the nature that you described?

A. No, I didn't know that at the time. I purchased the pipe.

The Court: You may ask him another question covering the other time covered in your first question, if you wish.

Q. And did you at any time from that time to

(Testimony of Frank Powser.)

the time of the accident know that there was any such foreign material in the pipe?

A. No, I didn't know.

Q. Did anyone of the chemical company advise you to be careful about the pipe?

A. No, they didn't.

Q. I am talking about the Penn. Salt Company.

A. No, they didn't advise me at all.

Q. Where is that pipe now?

A. This pipe is still laying in my yard, belongs to Radinsky.

Q. You don't own it now?

A. No, I don't own it now.

Q. What part of the yard is it located in now?

A. I would say about the edge of the yard.

Q. I beg your pardon?

A. The edge of the yard.

Q. You looked at those pictures. Do they represent the location of where the pipe is now?

A. Yes, they do.

The Court: At this point, we will take the noon recess. During this noon hour, I ask the jurors to remember and heed the Court's previous admonitions against receiving information about this case, and about all of the details as to which the Court instructed you, and this will apply at all times when you are absent from the jury box during the progress of the trial. All those connected with this case are excused until 1:45. Court will be in recess until 1:15. The Court has to take up another matter at 1:15.

(Testimony of Frank Powser.)

(At 12:10 o'clock p.m., Tuesday, November 22, 1949, proceedings recessed until 1:45 o'clock p.m., Tuesday, November 22, 1949.)

Seattle, Washington; November 22, 1949,
2:15 o'Clock, P.M.

The Court: All of the jurors are present as before the recess. All parties on trial are present with their counsel. You may proceed.

Q. Mr. Powser, you have identified Exhibits 7, 8, 9, and 10 as being pictures taken yesterday of the pipe in question, is that so? A. Yes, sir.

Q. You have them there, Mr. Powser?

A. Yes, sir.

Mr. A. L. Maslan: May it please Your Honor, I believe the jury might be interested in those pictures at the present time. May they be passed to the jury?

The Court: All these exhibits except those already passed to the jurors may be passed among the jurors under the same conditions as stated by the Court concerning the others. The jury is reminded that you do not have to make a detailed study of these exhibits now. You will have an opportunity later for more detailed and careful and a greater time consuming opportunity to make the more studied inspection.

Q. The bailiff will hand you Plaintiff's Exhibit 8 [23] which is in evidence. Do you notice that T there, or the connection to the right of that picture?

(Testimony of Frank Powser.)

A. Yes, sir.

Q. Could you state to the Court and jury from what particular part of that pipe the caustic material exuded or came out?

A. It came right out of that pipe, out of that corner.

Q. You are pointing to what particular section? Would you show the jury where you are pointing?

A. I am pointing right there, to that pipe.

Q. Would you state for the record just what portion that is, or where it came from?

A. It came right on the side.

Q. What do you call the side?

A. It is a pipe, a plug. It is a piece of pipe and a plug top.

Q. The plug top, you call it? A. Yes.

Q. Have you recently seen that pipe?

A. Well, I see it pretty near every day, walk around it.

Q. Is any of that material still discernible? Can you still see it? A. Not lately, no.

Q. But after the accident, could you see that material [24] for any length of time?

A. Well, the week after, it was still smoking out of the same place, out of that pipe.

Q. For a week afterwards?

A. Yes, a week or so.

Q. Prior to the accident, did you ever have any indication that there was such a material in the pipe? A. No, I didn't.

(Testimony of Frank Powser.)

Q. Would you testify to the jury what the condition of your car was after you took Oscar to the hospital? A. It burned the paint on my dash.

Q. What's that?

A. That thing burned the paint on my car, on my dash, and burned my hands, it was so strong.

Q. Did you know Oscar Haynes prior to the accident?

A. Yes, I knowed him before, saw him before.

Q. How long did you know him prior to the accident, if you recall?

A. I recall about six or seven months, something like that.

Q. Did you ever have occasion to notice his complexion, his features? A. Yes, I did.

Q. What was his complexion?

A. It was kind of a light complexion. [25]

Q. Was his face clear? A. It was clear.

Q. Is it much different than it is now?

A. Big difference.

Q. What's that? A. Big difference.

(Photograph marked Plaintiff's Exhibit 11 for identification.)

Q. I hand you Plaintiff's Exhibit 11 for identification and I will ask you whether you recognize that picture as being the picture of Oscar Haynes prior to the accident? A. Yes, I do.

Q. Is that a good replica of the way his features looked to you before the accident?

A. Yes, sir.

(Testimony of Frank Powser.)

Mr. A. L. Maslan: I offer that in evidence, may it please Your Honor.

The Court: It is now admitted.

(Plaintiff's Exhibit 11 received in evidence.)

Mr. A. L. Maslan: Will you pass Plaintiff's Exhibit 11 to the jury, please?

Q. I do not recall whether you testified whether there was other pipe in addition to the pipe in question in that load of scrap iron?

A. Yes, there was.

Q. Was there a good deal of pipe in addition to that pipe?

A. It was mixed scrap.

Q. In that mixed scrap, there was other pipe in addition to the pipe in question?

A. Yes, that's right.

Q. Did you ever have occasion to watch Oscar and his work?

A. Well, I watched him lots of times to work, yes.

Q. What type of workman was he?

A. He was a good worker.

Q. Was he a vigorous worker, heavy worker?

A. Well, he worked pretty steady.

Q. To your knowledge, did he have any bad habits as far as his work was concerned?

A. Not that I know of.

Q. Did he appear to be able to handle the heavy scrap iron and other heavy materials?

A. Yes, he did.

(Testimony of Frank Powser.)

Mr. Preston: Objected to as leading.

The Court: Sustained. Avoid leading.

Mr. A. L. Maslan: You may take the witness, counsel. [27]

Cross-Examination

By Mr. Preston:

Q. He didn't work for you?

A. No, he didn't.

Q. Never did work for you?

A. Never did.

Q. Your occasions of noticing him would be when he was working for somebody else?

A. That's right.

Mr. Preston: I have no questions except I would like to have the witness remain on another phase of the case concerning which we spoke.

The Court: Do not depart. Remain in attendance about the Court until you are later excused. You may step down now.

(Witness excused.)

The Court: Call the next witness.

HELEN MYERS

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [28]

Direct Examination

By Mr. A. L. Maslan:

Mr. A. L. Maslan: May it please Your Honor, at this time I am attempting to prove through the record clerk that these are the records, and we will introduce them through the proper source at a later time, through the doctor.

(Hospital records marked Plaintiff's Exhibits 12 and 13 for identification.)

Q. What is your full name?

A. Helen Edith Myers.

Q. What is your occupation?

A. I am the medical records librarian in charge of records at Tacoma General Hospital.

Q. In relation to your duties, have you occasion to keep the records in relation to the patient, Oscar V. Haynes at your hospital?

A. Yes, sir.

Q. Where do you live?

A. The street address?

Q. Yes.

A. 702 South K Street, Apartment 105, Tacoma.

Mr. Preston: Are you offering them at this time? [29]

The Court: Let the witness have a chance to see what it is, unless counsel can agree and state in

(Testimony of Helen Myers.)

the record pursuant to such agreement what it is.

Mr. Preston: I have no objection to the witness stating what it is. I haven't had opportunity to examine them as to admissibility.

The Court: You may proceed.

Q. The bailiff has handed you Exhibits 12 and 13. Would you state to the Court and jury what those are?

The Court: First as to Plaintiff's Exhibit 12.

The Witness: No. 12 is the admission record and case of the patient in the hospital.

The Court: Relating to what patient, if any?

The Witness: Relating to the hospitalization of Mr. Oscar Haynes during the period of February 20th continuously through April 18, 1948.

Q. Are those the records that were kept in the usual course of business of the hospital?

A. Yes, sir.

Q. Do you know how those records were kept?

A. Yes, sir.

Q. Will you please state how those records are kept?

A. I am not sure that I understand the question.

Q. Who did keep those records?

A. They would be filed in the medical record department of the hospital.

The Court: By whom, and who made them, if you know?

The Witness: They are made by a number of different people, the admitting clerk, and so on and

(Testimony of Helen Myers.)

so forth, the interne, the consultant, the emergency treatment, the chemical laboratory reports, the medication treatment, diet and progress record, the clothing list, and my notes appended stating that the chart has been taken to this Court. This portion of the chart is the nurse's notes. They are filed separately for convenience.

The Court: You made a statement there without indicating what exhibit it refers to. The last one mentioned was what?

The Witness: No. 13.

The Court: "This portion of the chart," did that refer to Plaintiff's Exhibit 13?

The Witness: Yes, sir.

Q. From reading these records, who was the doctor in charge of the case, do you remember?

A. Drs. Walter Cameron and J. Read.

Q. And they also made their notations on these records? A. Yes, sir. [31]

Q. In addition to the nurses and daily attendants? A. Yes, sir.

Q. Is that the usual practice of the hospital?

A. It is.

Q. Is that the usual practice of all hospitals, to your knowledge?

A. To my knowledge, yes, sir.

Mr. A. L. Maslan: I offer these records in evidence, may it please Your Honor, at this time.

The Court: Each of them is now admitted.

(Testimony of Helen Myers.)

(Plaintiff's Exhibits 12 and 13 received in evidence.)

Mr. A. L. Maslan: Take the witness.

Mr. Preston: No questions.

The Court: You may step down.

(Witness excused.)

Mr. A. L. Maslan: May I suggest to Your Honor that the records remain there until the doctor discusses them?

The Court: They are in evidence. They will have to remain.

Mr. A. L. Maslan: As far as this young lady is concerned, she might have some qualms about leaving them here. [32]

The Court: They are in evidence. Every one will have to understand that they are in the Court's custody. They will have to stay here for all time unless they are otherwise later disposed of.

FRANK RUSSELL

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Frank Russell.

Q. Where do you live?

(Testimony of Frank Russell.)

A. 4511—South Hood Street, Tacoma, Washington.

Q. What is your occupation.

A. Truck driver.

Q. Who do you work for?

A. Frank Powser.

Q. Are you still working for him?

A. Yes, sir..

Q. Were you working for Mr. Powser on the 20th day of February, 1948? A. I was. [33]

Q. Are you acquainted with Oscar Virgil Haynes? A. Yes, sir.

Q. This boy here? A. Yes, sir.

Q. Were you acquainted with him at that date?

A. What do you mean?

Q. Were you acquainted with him at that time, February 20th? A. Yes, sir.

Q. There has been some discussion had in relation to a certain coil of pipe. Looking at these exhibits, Exhibits 1, 2, 3 and 4 and Exhibits 7, 8, 9 and 10, could you state what those pictures represent? Do you know what those pictures represent?

A. Yes, sir.

Q. What? A. Pipe coil.

Q. Do you know where that pipe coil came from?

A. Yes, sir.

Q. Where did it come from?

A. I picked it up myself from the Pennsylvania Salt Company.

Q. Where is that Pennsylvania Salt Company?

(Testimony of Frank Russell.)

A. On the tide flats, at the tide flats.

Q. That is in Tacoma? [34]

A. Yes, sir.

Q. How far from your shop is that factory plant located?

A. Approximately across the flats about a mile or a mile and a quarter.

Q. In relation to the accident which occurred February 20, 1948, do you recall when you picked up that pipe?

A. I do not know the date. I hauled that pipe in the yard, but I do the month.

Q. What is that?

A. I don't exactly recall the day I hauled that pipe out of there.

The Court: We have not heard anything definite. You made some reference to the word, month. What do you mean as to when you hauled it?

The Witness: He asked me if I remembered the day I hauled that pipe into Mr. Powser's yard.

The Court: What was your answer?

The Witness: I don't recall the day.

The Court: Do you recall any other thing or fact as to the time when you did that act?

The Witness: Yes.

The Court: State it.

The Witness: We hauled that in January. [35]

The Court: In January, 1948, or some other year?

The Witness: 1948.

(Testimony of Frank Russell.)

Q. Approximately how long prior to February 20th would you say that was, February 20th being the day of the accident?

A. We didn't have the pipe there very long, between two and three weeks.

Q. Where was that pipe lying?

A. Laying right in the yard.

Q. Who picked up that pipe from the Pennsylvania Salt Manufacturing Company yard?

A. I did, and Mr. Frank Miller.

Q. Who were you working for at that time?

A. Frank Powser.

Q. And Mr Miller was working for Frank Powser at that time?

A. For that day, yes.

Q. Did you then take it to your yard from the salt company yard?

A. Yes, sir.

Q. Were you advised at any time that that pipe contained any chemical or caustic material?

A. I wasn't.

Q. Do you recall the accident itself?

A. I just got through eating my lunch when that happened, so I didn't see it with my own eyes.

Q. What was the first occasion that you heard that there was an accident?

A. The only thing, I turned around and hear him screaming.

Q. Hear who screaming?

A. That boy there.

Q. Could you state what he was doing at that time when he was screaming?

(Testimony of Frank Russell.)

A. I had to go around the truck to find out, there was too much excitement there at that time.

Q. What did you find when you got around the truck?

A. When I got around the truck, Mr. Powser and that colored boy was already walking him towards the car.

Q. Did the boy appear to be in pain?

A. Yes, sir, he was hollering.

Q. Do you know what he was saying?

A. Well, it is pretty hard, you know, when you are in a spot like that, you don't think very much; just get the boy to the hospital, that's the main thing.

Q. Who took him to the hospital?

A. Mr. Powser.

Q. Did you have occasion to notice what the condition of the pipe was at that time? [37]

A. No, sir.

Q. Were you riding with Powser when they took him to the hospital?

A. I stayed with him in the truck.

Q. What do you mean by that?

A. Trying to get him so they could get right of way in town. They give right of way quicker to the truck than they do to the car.

Q. Was the truck ahead of the car?

A. It was going, around 60 miles an hour, it should be.

Q. And the car followed you?

(Testimony of Frank Russell.)

A. The car was right alongside of me.

Q. What happened when you got to the hospital?

A. Well, sir, I don't know much. They took him in and I left.

Q. To go back to the yard? A. Yes, sir.

Q. Did you have occasion then to look at the pipe?

A. I did, and I told the other boys that was around to stay away from it, and I put a piece of tin right over that T.

Q. Was there any smoke? A. Yes, sir.

Q. Will you state what the condition of that nozzle was on the pipe? [38]

A. There is no nozzle, just a little connection from the pipe in a T crosswise.

Q. Would you state what the condition of that was at that time when you got back?

A. Well, they had some kind of a gray stuff, between white and gray, it was still steaming out of there, approximately that high, from the T. It was still coming out that high.

Q. How long did that steam continue, if you remember?

A. Four or five days. On the third day, I looked at it every morning when I come to work, and we finally put a piece of tin there and put a little mark on it for everybody to keep their hands off, because we didn't want an accident to happen in the yard by anybody else.

(Testimony of Frank Russell.)

Q. Under whose directions was it that you went to the Pennsylvania Salt Manufacturing Company to pick up the pipe?

A. Under Mr. Powser's direction.

Q. Who did you get the pipe from when you got to the salt company?

A. The Pennsylvania Salt Company in the tide flats.

Q. Was there any particular person that you dealt with who directed you to pick up that pipe?

A. It is hard to tell. Sometimes there is several men there. They supervise, tell you to take this. We don't ask questions when we go there, what we should take or [39] shouldn't. We take what we are told to take.

Q. How many days did it take you to pick up all that scrap iron?

A. I think I hauled two loads out of there.

Q. Can you recognize any of the gentlemen of the salt company here who directed you to pick up the pipe and take it out?

A. He didn't exactly direct me just to pick up the pipe alone, he directed me to pick up everything that was laying there.

Q. Did that include the pipe?

A. The pipe was in it.

The Court: The question is unanswered. Remind him of the question you put to him.

Q. The question was, who was it of the group, if there are any of the men here, who directed you to pick up that scrap iron, including the pipe?

(Testimony of Frank Russell.)

A. That gentleman there, but he didn't point directly at the coil. He told me, "That stuff goes."

Q. Who is that gentleman?

A. Right there on the end.

Q. At the table?

A. I think so. You look like him, but he didn't tell me the coil only. He told me what lays there.

Mr. A. L. Maslan: May I have the name? [40]

Mr. Starin: This is Mr. Edwin Cliffe.

Q. Did he, when he pointed to the scrap iron, including the pipe warn you about any propensities of the pipe? A. No, sir.

Q. Did he tell you at any time that the pipe contained any chemical? A. No, sir.

Q. Did you at any time have any knowledge that there was a chemical in the pipe?

A. I did not.

Q. Did you know Oscar Haynes before this accident? A. I did.

Q. How long a period of time did you know him?

A. I know him for six or seven months, and he hauled iron from the yard for Mr. Radinsky.

Q. Was he a good worker to your knowledge?

A. I didn't have time to watch him work, I had to do my own work.

Q. Handing you Plaintiff's Exhibit 11, showing you a picture which has been identified of Oscar

(Testimony of Frank Russell.)

Haynes, would you say that was a fair representation of his features prior to the accident?

A. Yes, lots of difference.

Mr. Preston: I submit that was not the question. The answer is not responsive.

The Court: The objection is sustained. It is stricken and the jury will disregard it. Try to have in mind the specific thing he asked you and respond to that.

Q. Mr. Russell, did that picture look like Oscar before the accident?

A. Before the accident, yes.

Mr. A. L. Maslan: That is all. You may take the witness.

Cross-Examination

By Mr. Preston:

Q. I understand you made two trips?

A. I am pretty sure it was two. I pick out the load of short scrap, and then we went back and had to use a small crane to load that stuff with it.

Q. Do you recall on which occasion it was you talked to Mr. Cliffe, or were directed by him?

A. There was two men there, and he didn't point to the coil and tell me, "Take it". He told me, "That stuff goes". There is another man there, but I don't recall his name.

Q. Was that the first time you went there?

(Testimony of Frank Russell.)

A. The first time we pick up all the short stuff.

Q. Do you remember whether it was the first or second trip on which you took this coil?

A. We took this coil on the last trip.

Q. Where did you take it?

A. To Frank Powser's yard.

Q. Did you take it anywhere in between?

A. No, sir.

Q. Or do anything with it? A. No, sir.

Q. Where did you unload it?

A. I unloaded it right at the yard.

Q. What do you mean, right in the yard? What part of the yard, the same place where it was later on?

A. The same place when Mr. Radinsky picked it up.

Q. What was it you said about January? I didn't get that.

A. I got mixed up on that, on the month. It was February.

Q. I take it that you mean to say that you got this load between two and three weeks before the accident happened whenever that was?

A. Well, the coil did lay in the yard from two to three weeks before it was sold by Mr. Powser.

Q. And you didn't get it as early as January, I take it? [43] A. No.

Q. Did you have any trouble getting the coil on the truck?

(Testimony of Frank Russell.)

A. We had a small crane there, and we done the best we could.

Q. How did it compare with the crane in the Powser yard? A. What?

Q. Did you have a crane in the Powser yard?

A. No, we took that small crane from the Powser yard to the Pennsylvania Salt to load heavy scrap iron with it.

Q. Were you able to load the coil onto the truck with the aid of the crane?

A. Yes, sir.

Q. Did you have to take a hammer and pound any part of it? A. No, sir.

Q. When you loaded this pipe, did you notice whether it was capped or not?

A. No, sir, I did not.

Q. How many of you loaded the pipe?

A. Two.

Q. And the same two unloaded it?

A. Yes, sir.

Q. Either on the occasion of loading or unloading it, [44] didn't you notice whether or not the pipe was capped, that is, closed?

A. Well, sir, we don't—

Q. Did you or didn't you? A. No.

Mr. Preston: That is all.

(Testimony of Frank Russell.)

Redirect Examination

By Mr. A. L. Maslan:

Q. Was that pipe purchased as part of the scrap iron? A. Yes, sir.

Q. And was there anything at all to lead you to believe that the pipe did contain this chemical?

Mr. Preston: That is not direct, it is repetitious and it is leading.

The Court: The objection is sustained. I think you have already brought out from the witness what knowledge he had.

Mr. A. L. Maslan: I don't think this was brought out, Your Honor.

Q. Was anything done to this pipe by you or Mr. Powser while it was in your yard and prior to the sale to Mr. Radinsky?

A. No, sir. It was placed there as scrap iron only. It wasn't salable for anything else. [45]

Q. I beg your pardon?

A. It wasn't salable for anything else. It was placed in a pile for scrap iron only.

Mr. A. L. Maslan: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. A. L. Maslan: Mr. Hubbard.

HUSTON HUBBARD

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Huston Hubbard.

Q. Where do you live?

A. 111—12th Avenue.

Q. What's that? A. 111—12th Avenue.

The Court: Is that in some city?

The Witness: Seattle. [46]

Q. That is in Seattle, is it not? A. Yes.

Q. Who do you work for?

A. B. R. Radinsky & Son.

Q. How long have you worked for him?

A. A little better than two years.

Q. Were you working for him on the 20th day of February, 1948? A. I was.

Q. Did you have occasion to travel with Oscar Haynes to Tacoma?

A. I was. He sent me out with him on a truck to help load the truck.

Q. Who is "he"? A. Jack, my boss man.

Q. Jack Radinsky? A. Yes.

Q. He sent you out with Oscar Haynes?

A. Yes.

Q. What truck were you driving?

A. A semi.

(Testimony of Huston Hubbard.)

Q. A semi truck. Would you tell the Court what type of truck that is?

A. Just a big truck, that's all I know. I couldn't explain it to you, a big, large truck. [47]

Q. Does it have a trailer attached to it?

A. Yes.

Q. What sort of bed did that truck have?

A. A steel bed. When you get ready to haul iron, you put some stakes on the side and steel plates up there.

Q. A flat bed? A. Yes.

Q. How long was that truck, do you know?

A. I would say about 40 feet.

Q. Did you proceed to load the iron on the truck at the Powser yard? A. I did.

Q. Who was with you?

A. Oscar Haynes.

Q. Would you tell the Court and jury how you proceeded to load that iron onto the truck?

A. We got there about 9:30, and when we got there they didn't have no crane.

Q. When you say you got there, where was it that you got? A. Tacoma.

Q. What yard?

A. Frank Powser Yard, and when we got there they didn't have no crane driver, and so we decided to pick up all the small iron, all the small pipes and load on the [48] truck, and we gathered up all the small pipes to load on the truck, decided we would eat lunch, and we ate lunch. We got through eating

(Testimony of Huston Hubbard.)

lunch about 11:30, started back to work and the crane man came, and we decided to pick this coil up and load on the truck. We loaded the coil on the truck, and as we loaded the coil, we put it on one side.

Q. How did you happen to load it?

A. With the crane. We let it down on the truck, and as we let it down, there was a nozzle holding it back from the side, so I just knocked the nozzle off.

Q. What's that?

A. I just knocked the nozzle off so we could push the pipe up close to the bed, so we could load the truck better. It was sticking out on the side so we couldn't load the truck good, so I asked Frank to hand me the sledge hammer, and he handed me the sledge. I was goin to hit it, but Oscar said, "Let me hit it" so I give Oscar the hammer and he hit it one lick and nothing happened, and he hit it two licks and it exploded in my face and his face, and I jumped back, fell over the truck. It was all on my eyes and face. I wiped it out of my eyes and face, and Oscar was hollering, "I can't see" so I managed to wipe it out of my glasses. I grabbed him and twisted his arm, kept him from rubbing his face, so I hollered to Frank Powser to come and take this boy to the hospital, and I turned around and I was pushing Oscar to the car.

As I pushed him in the car, Frank started the car and started to the hospital, and on the way to the hospital, Oscar grabbed his arm loose from me

(Testimony of Huston Hubbard.)

and rubbed his eyes, and he said, "My eyes are bleeding" and Powser said, "I think it looks like they are bleeding." I said, "No, they aren't bleeding" but his eyes was bleeding. I told him that so he wouldn't think nothing was happening.

It took us about 15 minutes to get to the hospital. I opened the door and pushed him out the car, in the hospital, in the elevator. We went downstairs on the elevator to the operating room, and I grabbed him and put him on the table, and he was hollering, "I can't see, don't leave me." The nurses came in and said, "What's the matter?" I said, "He got some acid or something in his face." They said, "Do you know what it is?" I said, "I don't." They said, "We'll call the chemical company."

They called and they said it was lye, and they started putting something in his eyes for lye. They called again and said it was something else. He was hollering, "Don't leave me, Huston." The nurses said, "Go out." He wouldn't let me go out, he was holding me, he was paining. In a few minutes, they managed to turn me loose and I walked outside and stood outside the hospital room.

Q. Did he appear to you to be in much pain? [50] A. Yes, awful pain.

Q. Did you have occasion to look at the pipe after the accident?

A. Yes. That happened about fifteen minutes to twelve, and we stayed up there to about 2:30, when we got back to the truck we had to unload pipe

(Testimony of Huston Hubbard.)

off the truck and the pipe was smoking and the stuff steaming out.

Q. Did you have any knowledge there had been any chemical or caustic in the pipe?

A. No. We asked that question before we loaded. We asked Frank Powser, was the pipe drained, because the pipe seemed so heavy. I didn't think a pipe should be so heavy unless something was in it. I asked Frank Powser was the pipe drained, and he says, "Yes, that was supposed to be drained."

Q. There was nothing to give you any idea?

A. Nothing to give me no idea.

Q. Did you have that maul in the truck?

A. No, we didn't have the maul in the truck.

Q. Where was the maul?

A. The maul was on the ground.

Q. Do you know what I mean by maul?

A. A sledge hammer.

Q. Yes. A. That's right. [51]

Q. Where did you get that sledge hammer from?

A. It was Frank Powser's sledge hammer.

Q. Were you well acquainted with Oscar Haynes before the accident?

A. Yes, about a year and a half.

Q. Did you work with him? A. Yes.

Q. Are you looking at Oscar Haynes now?

A. Yes.

Q. Is there much difference between his appearance now and his appearance before the accident?

(Testimony of Huston Hubbard.)

A. A whole lot of difference.

Q. What is the difference, as far as you can see?

A. The difference as far as I can see, he was a nice kid, a young kid, his face was smooth and in a better shape than it is now.

Yes, that is the shape he was in before he got hurt.

The Court: I think the witness has in his hands Plaintiff's Exhibit 11.

Q. You are speaking from Plaintiff's Exhibit 11, the picture of Oscar? A. Oscar, yes.

Q. Do you know what vision he had before the accident, Huston?

A. Yes, it seems like he was in good shape, that's all [52] I know.

The Court: That question relates to his eyes and ability to see.

The Witness: Yes, he could see good. He was a truck driver, he could see good, wasn't nothing wrong with his eyes as far as I know.

Q. Do you know what his condition is as far as seeing is now?

A. Well, it is bad, because you have to lead him around.

Q. Did he ever have to wear glasses, to your knowledge? A. No, no glasses.

Q. Handing you Plaintiff's Exhibits 1, 2, 3 and 4 and 7, 8, 9 and 10 which represent pictures of the pipe, I ask you can you identify the object pictured in those pictures?

(Testimony of Huston Hubbard.)

A. Yes, I can identify the pictures.

Q. What do those pictures show?

A. The coil of pipe Oscar got hurt by.

Q. In addition to that coil of pipe, were there any other objects you had placed in the truck?

A. No.

Q. What's that?

A. Nothing but the pipes, wasn't nothing in the way but this pipe, and this nozzle was in the way.

Q. I know, but were there any other pipes or pieces [53] of metal that you were putting into the truck?

A. No, nothing but the pipe.

Q. Was that the first load of scrap you had taken from the yard?

A. No, we had been hauling the day before.

Q. Do you remember what you hauled the day before?

A. Yes, we hauled motors.

Q. What's that?

A. We hauled car motors.

Q. That was from Powser's yard, was it?

A. Yes.

Mr. A. L. Maslan: Take the witness.

Cross-Examination

By Mr. Preston:

Q. Do I understand that when you started to put this coil in the truck, you noticed it was quite heavy?

A. Yes.

Q. Did both you and Mr. Haynes discuss that?

A. No, didn't discuss that. I just discussed that

(Testimony of Huston Hubbard.)

myself because I handled iron and I figured I could handle one end of it swinging, and I figured I could handle one end, because I handled more pipes and coils like that, and I figured I could handle one end of it, and I couldn't handle that end. [54]

Q. When was it you asked Mr. Powser about whether or not the pipe had been drained?

A. Just before we picked it up.

Q. Before you did what?

A. Before we picked up the pipe.

Q. When you say, "we," who do you mean?

A. I mean the truck driver, the one that had the crane. I don't know his name, the one driving the crane. I asked him before he picked it up to be put on the truck.

Q. Where was Mr. Haynes when this conversation took place about the draining or non-draining of this coil?

A. He was standing on the truck.

Q. How close to you?

A. Closer from here to that desk there.

Q. You say as close or closer?

A. As close, to that desk.

Q. Who did you talk to about that?

A. Frank Powser.

Q. You asked him if that coil had been drained?

A. I asked him was the coil drained, was anything in the coil.

Q. What did he say?

A. He says it was supposed to be empty.

(Testimony of Huston Hubbard.)

Q. Supposed to be empty? A. Yes. [55]

Q. But it didn't feel to you as though it was empty? A. It felt heavy to me.

Q. When he said it was supposed to be empty, did you do anything about determining whether it was empty or not?

A. No, didn't give me no idea there was nothing in it. I just thought it was heavy, that's all.

Q. Did you notice whether or not it was capped?

A. The only thing I noticed, just a nozzle on the end, that's all.

Q. Did you notice whether it was closed off?

A. No, didn't pay no attention to that.

Q. Did I understand you to say that you got some of this substance in your face?

A. In my face, it made sores in my face.

Q. Did you get any in your eyes?

A. No, because I had glasses on. If it got in my eyes, I would have been blind.

Q. You were wearing the same kind of glasses you have on now?

A. I got glasses on account of my eyes—I got one eye——

Q. You are wearing the same glasses?

A. The same glasses on now.

Q. You got some burns on your face?

A. I got some burns on my face. [56]

Q. How much of the acid did you yourself get on your face?

(Testimony of Huston Hubbard.)

A. On my face, I don't know, all in my face and glasses and on my clothes.

Q. From what you got on your face, were you hospitalized? A. No.

Q. Did you wipe it off right away?

A. Yes.

Q. Both you and Mr. Haynes were working for B. Radinsky? A. Yes.

Q. What kind of company is that?

A. Junk yard.

Q. Operating trucks? A. Yes, trucks.

Q. Hauled junk by trucks?

A. Hauled junk by trucks, yes.

Q. And Mr. Haynes was truck driver and loader for that particular truck?

A. He was a truck driver, and he helped load, and I was the one that helped load the truck.

Q. He would load with you?

A. With me, yes.

Q. That was a regular part of his duties? [57]

A. That's right.

Mr. Preston: That is all.

The Court: You may step down.

(Witness excused.)

FRANK MILLER

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Frank Miller.

Q. Where do you live?

A. 1340 $\frac{1}{2}$ Pacific Avenue, Tacoma.

Q. 1341 $\frac{1}{2}$? A. 1340 $\frac{1}{2}$.

Q. Tacoma, Washington?

A. Yes, sir.

Q. What is your occupation?

A. Truck driver.

Q. Have you ever had occasion to work for Mr. Frank Powser? [58] A. Yes, sir.

Q. Do you recall picking up some scrap iron from the Pennsylvania Salt Manufacturing Company? A. Yes, sir.

Q. For Mr. Powser? A. Yes, sir.

Q. Do you recall when that was?

A. Sometime in February.

Q. Of what year? A. 1948.

Q. And who picked up the scrap iron?

A. Me and Mr. Russell.

Q. Frank Russell? A. Yes, sir.

Q. At that time were you working for Frank Powser?

(Testimony of Frank Miller.)

A. I was working for Frank Powser at that time.

Q. Was this prior to the accident to Oscar Haynes? A. Yes, sir.

Q. Did you accompany Frank Powser to the Pennsylvania Salt Manufacturing Company yard?

A. Frank Powser? No, sir.

Q. I beg your pardon, did you accompany Frank Russell? A. Yes, sir.

Q. At whose request did you go there?

A. Mr. Powser. [59]

Q. What did you do when you went to the salt company yard?

A. I went over there with the crane, the cherry picker is what we call it.

Q. A cherry picker? A. A hoist.

Q. For what purpose did you go there?

A. To lift up heavy material, scrap, to load some heavy scrap.

Q. Were any of the employees of the Pennsylvania Salt Manufacturing Company there to show you what the scrap was? A. Yes, sir.

Q. Who were those employees, do you know?

A. I am not personally acquainted with them.

Q. Do you know any of them here?

A. I think this gentleman on the corner.

Q. Is that Mr. Cliffe?

A. I don't know his name.

Q. Did he show you what scrap iron to load onto your truck?

(Testimony of Frank Miller.)

A. He showed us part of this scrap laying around there, what to pick up and what to leave.

Q. And in relation to the coil of pipe, did he indicate that that pipe was to be picked up by you?

A. Yes, sir.

Q. And was that included in the pile of scrap iron? A. Yes, sir.

Q. Handing you Plaintiff's Exhibits 1, 2, 3 and 4 and 7, 8, 9 and 10, what do those exhibits depict or show to you? A. It shows the coil.

Q. Were you advised by the employees of the Pennsylvania Salt Manufacturing Company that the coil was part of the scrap iron bought by Mr. Powser? A. Yes, sir.

Q. Pursuant to their direction, did you proceed to load that pipe onto your truck?

A. I wasn't driving the truck, Mr. Russell was driving the truck.

Q. Did you assist Mr. Russell?

A. I was running the hoist.

Q. Were you the one who hoisted that pipe onto the truck? A. Yes, sir.

Q. Do you know what happened to that pipe thereafter?

A. We took it over to the yard and I unloaded it at the yard.

Q. Did Mr. Cliffe or any other employee of the Pennsylvania Salt Manufacturing Company advise

(Testimony of Frank Miller.)

you that that pipe might contain any caustic or acid? [61] A. No, sir.

Q. Were you advised to use any extra precaution or care in the handling of that pipe?

A. No, sir.

Q. Did you have any idea that that pipe might contain any——

Mr. Preston: Objected to as leading and suggestive.

The Court: The objection is sustained. You may ask him another question.

Q. Was there anything which would lead you to believe that the pipe contained such an object?

A. No, sir.

Q. What did you do with the pipe when you got to the Powser yard?

A. We unloaded it right in the rest of the scrap iron.

Q. Were there any other pipes and pipe scrap in the load of scrap iron? A. Yes.

Q. In addition to this coil of pipe?

A. Yes.

Q. Did this coil of pipe have the appearance to you of being discarded?

Mr. Preston: Just a minute, if the Court please. That calls for a conclusion. He can say what shape it [62] was in.

The Court: Sustained.

Q. What happened to that pipe thereafter, if you know?

(Testimony of Frank Miller.)

A. It laid there in the yard for several weeks, that's all I know.

Q. Did anyone touch that pipe between the time that you brought it to the Powser yard and the time of the accident?

A. I don't know how they could, they couldn't move it.

Q. Was it a heavy piece of pipe? A. Yes.

Q. You have dealt with scrap iron, have you?

A. Yes, sir.

Q. How long a time have you been dealing with scrap iron?

A. Off and on for a couple of years.

Q. Could you estimate how much that coil of pipe weighed?

A. I would say about 1500 pounds.

Q. Do you recall when the Radinskys purchased that pipe, if you know? A. I don't know.

Q. Do you recall the accident of which we are talking? [63] A. Yes, sir.

Q. Could you state the circumstances in relation to the accident?

A. Well, I picked up with the hoist——

Q. I beg your pardon?

A. I picked up this coil with the hoist, and they hooked on to it. I picked it up, drove out the back end of the truck, and put it right onto the semi.

Q. Who did that semi belong to?

A. Radinsky & Son.

Q. At the time that this happened, who did you

(Testimony of Frank Miller.)

work for? A. I was working for Radinsky.

Q. In order to get this straight, at the time that you picked up the iron and scrap from the Pennsylvania Salt Manufacturing Company, who were you working for? A. Frank Powser.

Q. How did you happen to work for Radinsky on the 20th day of February?

A. I come over to the yard, and they didn't have nobody to run this crane or hoist, and they wanted this stuff loaded on, so I loaded it.

Q. And at that time you were working for Radinsky? A. Yes.

Q. Would you state what happened after that pipe was [64] loaded by you into that semi-trailer?

A. It was loaded onto the semi-trailer and they wanted to get it up against the side, and this T was on the coil, was in the way, and the first thing I knew, I seen them with the hammer, hitting it, and all at once it just flared up, kind of a gray foam come out of it.

Q. What did they do?

A. It went right into Mr. Haynes' face.

Q. What happened then as far as Mr. Haynes was concerned? A. He jumped off the truck.

Q. What did he do?

A. He ran and hollered, had his hands up to his face, and screaming, said he was burned.

Q. Did he appear to you to be in pain?

A. Yes, he must have been in awful pain.

Q. I beg your pardon?

(Testimony of Frank Miller.)

A. The way he was hollering, he must have been in awful pain.

Q. Was he running or on the ground at that time?

A. He jumped clear off, and he run, I would say, 15 feet and then stopped.

Q. What was the condition of the pipe at that time? A. It was on the truck.

Q. I know, but was there anything that was different [65] with the pipe after it had been hit?

A. Well, this foam was coming out of it all over the truck.

Q. Then what happened, as far as Oscar Haynes was concerned?

A. They took him to the hospital.

Q. Did you go with him? A. No, sir.

Q. What did you do?

A. I stayed in the yard.

Q. Did you have occasion to notice the pipe again? A. Yes, sir.

Q. What was the condition of the pipe?

A. This T, there was a crack in it, I imagine that long where it was welded onto this pipe.

Q. Where it was what?

A. Where it was welded onto the pipe.

Q. Was there anything coming out of this crack?

A. Yes, sir.

Q. What was that?

A. Kind of a yellow foam, not yellow foam, a gray foam.

(Testimony of Frank Miller.)

Q. Did you have occasion to go back to the yard later, a day or two or days later? A. Yes.

Q. Did you have occasion to notice the pipe again? A. Yes, sir.

Q. What would you state was the condition of the pipe two or three days later?

A. It was still fizzling and coming out of that pipe.

Q. How many days thereafter, if you remember?

A. I don't remember how many days afterwards.

Q. Did you know Oscar before the accident?

A. I met him, I think I helped load him out two or three times when he come over there.

Q. Do you know whether he was a good worker, do you remember?

A. As far as I know, he was always on the job.

Mr. A. L. Maslan: Take the witness.

Cross-Examination

By Mr. Preston:

Q. Do I understand you were working for Frank Powser until when?

A. We hauled that—I was working at the time we hauled that stuff from the Pennsylvania Salt. I worked for him off and on, a day now and a day then.

Q. When did you start working for Radinsky?

A. The day we loaded this pipe, this coil.

Q. You mean the day you loaded it where? [67]

(Testimony of Frank Miller.)

A. Just about, it was only a couple of hours.

Q. You say you started working for him the day you loaded this. Now, you loaded it two places, at the Powser yard and——

A. It was after it was unloaded. I unloaded it from the Pennsylvania Salt, working for Powser at the yard, and several weeks afterwards I loaded it on for Mr. Radinsky.

Q. When did you start working for Mr. Radinsky? A. Just that load.

Q. Do you mean by that that you started to work for Radinsky at the time this accident happened? A. Yes.

Q. On that day, was it? A. Yes.

Q. And not before? A. No.

Q. Who employed you?

A. It was between Mr. Powser and Radinsky. There was a mutual agreement between them.

Q. Didn't you have anything to do with it, who you were working for?

A. Mr. Radinsky was the one that was supposed to pay me.

Q. I still don't follow you on that. You mean they just traded you off? [68]

A. No, I wasn't working for Powser either. I just come in the yard.

Q. Who employed you when you came in the yard?

Mr. A. L. Maslan: What day are you referring to?

Mr. Preston: The day he said he started to work

(Testimony of Frank Miller.)

for Radinsky, the day of the accident.

Q. Who employed you at that time?

A. Radinsky.

Q. Was he there? A. Yes, he was there.

Q. At the Powser yard at this time?

A. I think he was.

Q. Are you sure about that?

A. I am pretty sure he was.

Q. What?

A. I am pretty sure he was. He was there and he left.

Q. Do you remember his actually employing you? A. I am pretty sure he did.

Q. Did he pay you?

A. Mr. Powser paid me, and as I understand, he reimbursed Mr. Powser.

Q. Do you have any recollection of Mr. Radinsky saying, "Here, you work for me today" or any condition to that effect, "I am going to hire you today" or anything like that?

A. He wanted to know if I would run the hoist.

Q. Who wanted to know if you would run the hoist? A. Radinsky.

Q. You remember that now? A. Yes.

Q. Where did that conversation take place?

A. In the yard.

Q. Do you remember he was there?

A. Yes.

Q. He wanted you to run the hoist that day?

A. Yes.

Q. Mr. Miller, you spoke of after the accident,

(Testimony of Frank Miller.)

this vapor or whatever — I don't know how you would describe it, whatever it was coming from this pipe, do you remember? A. Yes, sir.

Q. What part of the pipe did it come from?

A. It come out of this T.

Q. You mean out of the end of the T?

A. No, the T was still on there and it was broke where it was welded onto the pipe.

Q. The T was broken off?

A. After it was hit. The T wasn't, the pipe was broke, the nipple where this T was on was welded into this pipe, into this coil, and when it was hit, it broke the seam in there and let it out.

Q. When it was hit, it broke a seam of the pipe?

A. No, the seam where it was welded.

Q. Where it was welded?

A. Where it was welded into the coil.

Q. Where what was welded onto the coil?

A. This T.

Q. When you first picked that coil up at the Penn. Salt Manufacturing Company, did you notice whether it was capped or not?

A. I never paid no attention to it.

Q. I take it you didn't notice whether it was capped or not? A. No.

Q. Was the T in the same condition as when you saw it after the accident?

A. All except there where it was opened up.

Q. You didn't notice the T beforehand, did you?

A. Yes, I had noticed the T.

(Testimony of Frank Miller.)

Q. Did you notice whether it was closed or not?

A. I never paid no attention to it.

Q. When you say it was the same, you don't mean that you actually noticed beforehand whether the pipe was closed or not, is that correct?

A. I know it was on there, and that's all.

Q. You said that nothing was done to that pipe, that coil, from the time you unloaded it at the Powser yard [71] until the time of the accident. You didn't watch it during that time, did you?

A. No, sir.

Q. As a matter of fact, you weren't even working for Mr. Powser during that period, were you?

A. No, but I come through the yard.

Q. You didn't examine that coil each time?

A. No.

Q. As a matter of fact, you didn't pay any attention to it from the time you unloaded it until you started loading it up again some three weeks later, isn't that correct? A. Yes, sir.

The Court: At this point, we will take a recess for about ten minutes.

(Recess.)

The Court: Let the record show all jurors have returned to their places as before the recess, and that all parties on trial with their counsel are present. You may proceed.

Q. Mr. Miller, did you see any tin arrangement over this pipe afterwards to prevent the vapor or

(Testimony of Frank Miller.)

whatever it was from going out, or anybody brushing up against it?

A. I think that was put on right after the accident.

Q. Did you see it? [72] A. Yes, sir.

Q. When was that put on?

A. I think it was put on right after it was taken off.

The Court: After what was taken off?

The Witness: After the coil was taken off the truck.

Q. You mean after the accident?

A. Yes, sir.

Q. By "right after" what do you mean by that?

A. After I lifted it off the truck and laid it on the ground again, I think we put a tin over it.

Q. You mean that was before Mr. Haynes went to the hospital? A. No, afterwards.

Q. How long afterwards?

A. Several hours, I guess.

Q. Did you do that yourself?

A. No, I didn't.

Q. Did you see it done? A. Yes.

Q. Who did it?

A. I think Mr. Russell did.

Q. That was the man that went out and got this coil originally from the Pennsylvania Salt Manufacturing Company? [73] A. Yes, sir.

Mr. Preston: That is all.

(Testimony of Frank Miller.)

Redirect Examination

By Mr. A. L. Maslan:

Q. Are you steadily employed?

A. No, sir.

Q. Do you do odd jobs? A. Yes, sir.

Q. Were you doing odd jobs about the time of the accident? A. Yes, sir.

Q. At the time that you were working for Powser, when you picked up that scrap iron from the Pennsylvania Salt Manufacturing Company?

A. Yes, sir.

Q. Were you working by the week, or was it by the job or by the day? A. By the hour.

Q. Did you get much time in about that time?

A. No.

Q. At the time of the accident, that is the date of the accident, February 20th, do you know how many hours you worked that day?

A. I don't remember. [74]

The Court: Repeat for our convenience where you said you were when the accident happened. Were you anywhere near the place where the accident happened?

The Witness: I was sitting on the hoist, running the hoist.

The Court: You were operating the hoist?

The Witness: Yes, sir.

The Court: Did you witness the occurrence of the accident?

(Testimony of Frank Miller.)

The Witness: Yes, sir.

The Court: You saw it happen? -

The Witness: Yes, sir.

The Court: You saw what the plaintiff was doing with the sledge hammer and you saw what happened in connection with his use of the sledge hammer?

The Witness: Yes, sir.

The Court: Is there anything else?

Mr. A. L. Maslan: That's all.

The Court: You may step down.

(Witness excused.)

Mr. A. L. Maslan: Oscar, will you take the stand, please? [75]

OSCAR VIRGIL HAYNES

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name?

A. Oscar Virgil Haynes.

Q. Where do you live?

A. 2710 Yesler Way, Seattle, Washington.

Q. How old are you now? A. I am 23.

Q. Where were you born?

A. I was born in Pittsburg, Kansas.

(Testimony of Oscar Virgil Haynes.)

Q. How long have you lived in the city of Seattle?

A. We moved here from Kansas in 1941, the early part of the year, and I have been here ever since except two years I served in the army.

Q. Was that overseas duty?

A. All except six months of it.

Q. Are you a resident of the city of Seattle?

A. Yes, sir.

Q. How long is it since you have been permanently [76] residing in Seattle?

A. Ever since I came here.

Q. That was in 1941? A. Yes, sir.

Q. Are you working at the present time?

A. No, sir.

Q. Who do you live with now?

A. With my parents.

Q. Who are your parents?

A. Mr. and Mrs. George Haynes.

Q. Is your father working? A. Yes, sir.

Q. Where does he work?

A. He works at B. Radinsky & Son.

Q. The testimony has been that there was this accident on February 20, 1948? A. Yes, sir.

Q. Who were you working for at that time?

A. B. Radinsky & Son.

Q. How long had you been working for them prior to the accident?

A. Since the day after Labor Day, 1946.

Q. How did you happen to get the job there?

(Testimony of Oscar Virgil Haynes.)

A. My father was called there from the union hall to operate the crane in that yard. I drove him to work that [77] morning, and I wasn't doing anything. I just come out of the army the month before, and Mr. Radinsky asked me if I wanted a job. At that time I said, "No. I just come out of the army. I don't believe I would like to go to work so soon," and he says, "Well, I need some help," so he says, "You better take the job." I says, "O. K., I'll go to work," so I went to work the same day my father did.

Q. Did you work from that day steady to the time of the accident? A. I did.

Q. What type of work did you do?

A. For a while I worked in the yard loading scrap buckets so they could be loaded into the railroad cars, and we moved a lot of paper, big bales that were some six feet tall, and weighed anywhere from 1500 to 2400 pounds. It was heavy work, and then I went to work on the truck.

Q. Were you able to do that heavy work?

A. Yes, sir.

Q. When did you start working on the truck?

A. Well, it was right after I went there. I used to go out with the truck and help load it. At that time, there was another driver. I don't recall the exact date.

Q. Do you recall the day of the accident?

A. Yes, sir.

Q. What was that date? [78]

(Testimony of Oscar Virgil Haynes.)

A. February 20, 1948.

Q. Would you relate the circumstances to the Court and jury, that is, the facts about how the accident happened?

A. We left B. Radinsky & Son, the yard where the truck was parked. At that time, I was driving this semi and I had been for quite some time.

Q. Would you tell the Court and jury what you mean by semi?

The Court: Semi what?

The Witness: It was a semi truck. It had a——

The Court: Do you mean a semi truck or semi trailer?

The Witness: It all comes under semi, sir.

The Court: Semi what? Semi means half, does it not?

The Witness: Yes.

The Court: Half what? Half trailer or half truck, what is it?

The Witness: It was half trailer and half truck. The trailer was 35 feet long, and there was a 5 pound wheel on the back of the tractor that pulled this trailer which was set on there through a king pin. From the trailer that went into the truck and it had a swivel movement, that is the semi truck I was driving for B. Radinsky & Son. [79]

We left the yard about 8:30, February 20th. We were instructed to go to Frank Powser's yard and pick up some scrap iron. At the time, I didn't know what it was. It was just scrap iron. We got to the

(Testimony of Oscar Virgil Haynes.)

yard and they showed us what to take and there was a lot of pipe. There was lots of pipe there. We didn't ask where it come from or anything about it, but this big coil was there and we didn't have no crane to load this big coil. We wanted to get the heavy stuff on the bottom, but it was impossible to do so at that time, so there was some smaller pipe that we loaded by hand, which we was able to do until the time the crane came. Then we loaded the heavy pipe, which was several other pieces besides the big coil, and a great big round—I thought it looked like it might be a boiler or something like that. It went on there too, besides the coil of pipe, but we had another one to go on there and it was pretty heavy and I wanted to get it over the back wheels of the trailer so it would be a balanced load.

A heavy load like that, anywhere from fifteen to eighteen ton, is quite a responsibility on the highway, so I had to get this load fairly even on the truck. We got this coil of pipe on there. Mr. Hubbard, my helper, he was up on the truck. He told me—at that [80] time this sledge hammer was handed up to him and I asked him if he would take the sledge hammer and hit this coil of pipe and move it over so this other boiler would go down in the back of the truck beside the one that was on there, but I was standing closer and I says, "Here, Huston, I'll do it. I'm closer." At that I took the sledge hammer and hit this pipe twice. The second time I hit it, it was just like a shell blowing up in

(Testimony of Oscar Virgil Haynes.)

my face, and it made a big rushing boom noise and it blowed my hat off and it stunned me and the feeling was gone out of my face. I couldn't feel nothing at first and it felt like I had dirt in my eyes, so I went to rub them and my whole face was slick. Then I knew it wasn't dirt, that it was some kind of liquid.

I was standing right by the edge of the truck, so I turned around and just jumped off, in which my legs hit on some other iron which I could not see, but I was—I had to get off the truck from where stuff was coming out. When I hit the ground, it seemed like it jarred all the feelings back in my face, and I never had a feeling hurt me so bad in my life.

Then at that time Mr. Hubbard, my helper, had wiped off his glasses—at that time I did not know he had any acid on him—so he twisted my arms behind me and they was pushing me towards the car and I [81] couldn't see nothing then. I couldn't even close my eyes. They were full of this paste-like stuff and it was burning terrific. Then we got in Mr. Powser's car which I couldn't see. I couldn't see the way to go to the hospital, but we went through town evidently, because I heard the truck right beside us.

We got to the hospital. They still had hold of my arms behind me, and I couldn't get loose. I still had on my gloves that I was working in, my shirt, my clothes. My hat was gone and my hair was full

(Testimony of Oscar Virgil Haynes.)

of that acid stuff and my scalp was burning awful. We got to the hospital room and they began to put water and stuff on my face and it went plumb down my throat, and I tried to spit it out, and at that time the whole lining of my mouth came out where I had opened my mouth, evidently, and it had blowed in my mouth, up my nose and in my right ear. They poured something on my face, I don't know what it was, but after that I could feel it begin to swell up. It swelled up and my eyes swelled shut. My face swelled big enough that it swelled plumb over my right ear, I couldn't even feel it. My nose was swelled plumb over my face. They had a big sock over my head, and an elastic sock of some kind, and it felt like they had taken a whole gallon of vaseline or something and greased my face. They [82] put this sock over my head and pulled some kind of cloth through my mouth, for some reason, I don't know why. That was on there for quite some time.

I couldn't eat for about four days. I was fed through the arms and they gave me pain pills to keep the pain killed and sleeping pills at night so that I would just go to sleep. Finally, my face began to go down, the swelling did. Then they took off the sock.

Q. How long did you stay in the hospital?

A. For 58 days.

Q. Coming back to the accident proper, did you have any knowledge prior to the time you hit that

(Testimony of Oscar Virgil Haynes.)

pipe with the maul that there was any foreign material or caustic or acid in the pipe?

A. None whatsoever.

Q. Was there anything that would lead you to believe that there might be anything in the pipe?

A. No, sir.

Q. Did anyone tell you that there might be something in the pipe? A. No, sir.

Q. You used that maul? Whose?

A. The maul, if I remember, the one we used on that pipe, was the one that we had on the truck. It was kept there for that purpose and we had busted lots of iron with it [83] before.

Q. You say that is the purpose for keeping the maul on your truck? A. Yes, sir.

Q. Why do you use the maul for moving these heavy irons?

A. So we can knock these big pieces apart and get on a good load, a paying load and not come back with a windy load, they call them.

Q. What is a windy load? Would you explain that?

A. A windy load is where there is a lot of space in between, and very little weight, but it adds up bulky.

Q. You say you were in the hospital 58 days?

A. Yes, sir.

Q. Who treated you there?

A. Dr. Cameron treated my eyes at Tacoma. Dr. Jess Read treated my face at Tacoma.

(Testimony of Oscar Virgil Haynes.)

Q. Are you still receiving treatment for your eyes?

A. Yes, sir, Dr. Jensen is looking after them now, of Seattle.

Q. What vision did you have before you suffered this accident?

A. My eyes were perfect, 20-20 vision.

Q. What's that? A. I had 20-20 vision.

Q. How do you know that?

A. They tested in the army, that is the last time I had them tested.

Q. Did you develop any particular prowess with the use of guns?

A. Yes, sir, I was gunner on a tank, 105 howitzer.

Q. What's that?

A. I was a gunner on an M 7 tank in the Philippines.

Q. Were you in action there?

A. Yes, sir.

Q. Were you injured in any way, your eyes, there? A. No, sir.

Q. Did you come out of the army with perfect vision? A. Yes, sir.

Q. Did you earn any medals for your prowess as a rifleman in any way?

A. Sharp shooter.

Q. How many types of medals are given in the army, if you know, for shooting?

A. There is three different classes.

Q. What are they?

(Testimony of Oscar Virgil Haynes.)

A. The marksman, sharp shooter, and expert.

Q. Which one did you make of those three?

A. I made the sharp shooter.

Q. Is that considered good in the army? [85]

A. Yes, sir, it is.

Q. And you state you were a gunner on a tank?

A. Yes, sir.

Q. What type of tank? A. An M 7.

Q. What type of tank is that?

A. It is a tank that is—that hasn't got no protection from the waist up, and the gun will only traverse about 15 degrees in front, with a 105 howitzer on it. To shoot to the rear, you have to turn the whole tank around.

Q. You were a gunner on that tank?

A. Yes, sir.

Q. Did that necessitate the use of good eyes?

A. Yes, sir, it did.

Q. Were you tested for your eyes before you were given that job?

A. Not particularly, except before we went overseas.

Q. What's that?

A. Not particularly for that certain job, but before we went overseas we were given a thorough examination.

Q. Were you in active combat?

A. Yes, sir.

Q. How long? A. For about five months.

Q. What unit were you in? [86]

(Testimony of Oscar Virgil Haynes.)

A. I was with the 35th Regiment of the 25th Division.

Q. They saw war service in the Philippines, did they not? A. Yes, sir.

Q. What was your health before the accident?

A. I was in perfect shape. There was no defects about me.

Q. What's that?

A. There was no defects about me.

Q. What rating did you have when you got out of the army?

A. I come out a staff sergeant.

Q. How old were you when you got out of the army? A. I was 20.

Q. What education have you had?

A. I had two years of high school.

Q. When did you get into the army?

A. August 9, 1945.

Q. Was that 1945 or——

A. Excuse me, 1944.

Q. When did you get out of the army?

A. August 20, in 1946.

Q. When did you start working for Mr. Radinsky?

A. The day after Labor Day, September in 1946.

Q. Prior to getting in the army in August, 1944, what [87] work did you do?

A. I worked in the shipyards, Lake Washington Shipyards.

Q. How long did you work there?

(Testimony of Oscar Virgil Haynes.)

A. For a little over a year.

Q. How old were you when you worked in the shipyards?

A. I was 17 then. Prior to that, I worked at the Bremerton Navy Yard.

Q. How old were you then?

A. I started to work there right after I was 16.

Q. Was that the first job that you had, at the Bremerton Navy Yard? A. Yes, sir.

Q. What high school did you go to in Seattle?

A. Garfield.

Q. How long did you go there?

A. About a year.

Q. Prior to getting work in the shipyards, Navy yard, what type of work did you do?

A. I went to school up to that time.

Q. Did you do any work before that?

A. Yes, sir, on the farm.

Q. Where was that? A. In Kansas.

Q. Are you able to do any work now? [88]

A. No, sir, I haven't been.

Q. You have some vision left, do you not?

A. Some, yes.

Q. Can you see the features of the jurors to your left, Oscar?

A. The first ones here on the end, I can, but I can't down there.

Q. Down where?

A. I can see to the man with the brown suit on, I believe.

(Testimony of Oscar Virgil Haynes.)

Q. Can you see the gentleman in the second row, the last gentleman there?

A. I can see his white necktie, white shirt.

Q. Do you know the color of the necktie he is wearing? A. No, sir.

Q. Can you see me?

A. I can just see your form.

Q. Can you tell it is I?

A. Excuse the expression, yes.

Q. How can you tell?

A. By your bald head.

Q. Can you read the newspaper now?

A. No, sir, I can't.

Q. You were recently examined by your eye doctor. Could you read that large E that they usually have on those [89] eye charts?

A. The very large ones, I could see.

Q. How close were you, do you remember?

A. Not too far away, I don't know exactly, no.

Q. How much were you making working for B. Radinsky?

A. From 80 to 90 dollars a week.

Q. At the time of the accident, that is, prior to the accident, immediately prior?

A. Yes, sir.

Q. Do you know how much you made, that is, earned in the year 1947? A. Almost \$3000.

Q. What did you do with your money?

A. Most of it went to my home.

Q. What home is that?

(Testimony of Oscar Virgil Haynes.)

A. Where my mother and father live.

Q. You live with your mother and father?

A. Yes, sir.

Q. How many children in the family?

A. Seven of us.

Q. Are you the oldest? A. Yes, sir.

Q. Is your eyesight, as far as you could see, getting any better?

A. It might be getting a little better. They are getting more even, the eyes are.

Q. What do you mean by that, Oscar?

A. The sight is, well, more or less—both eyes are getting to see fairly the same, but the right eye is a lot stronger than the left one yet.

Q. Does the difference in weather affect your eyes in any way?

A. Yes, sir, a great deal.

Q. In what way?

A. On a real bright sunny day, I can't see nothing. It fades out.

Q. What happens on cloudy days?

A. I can see a little. It shuts out the glare.

Q. Can you see your way around your own home? A. Yes, sir.

Q. Can you make your way around your own home? A. Yes, sir.

Q. What do you do during the day?

A. Just stay home.

Q. Do you occupy yourself in any way?

A. Well, I don't get up too early.

(Testimony of Oscar Virgil Haynes.)

Q. Do you listen to the radio?

A. Yes, sir.

Q. Were you very active before the accident?

A. I thought so. [91]

Q. I am referring to your face now. Has that cleared up pretty well by now?

A. Some of it has. There is some there that won't go away. It will always be there.

Q. Would you refer to that and point to it and tell us about that if you can?

A. This along where my nose is, here around my nose, and cheek, and the side of my mouth.

The Court: On which side of your face?

The Witness: On the right side and on the left side of my nose and on my forehead. Those are permanent, especially the one on the left side of my forehead.

Q. Is your face more painful sometimes than others, other days?

A. Yes, sir, it is.

Q. Do you have any reason for that, as far as you know yourself?

A. Except every so often, those places, those scars, will break out like a boil and they are very sore.

Q. Do you still do that?

A. Yes, sir.

Q. How often would you say that happens?

A. That happened about three weeks ago.

Q. How long do those boils or sores remain?

A. They stay there seven or eight days.

Q. Is it painful, are these boils painful?

(Testimony of Oscar Virgil Haynes.)

A. Yes, sir, they hurt very much.

Q. What's that? A. They hurt very much.

Q. Have you earned any money since you have been injured? A. No, sir.

Q. Was any other part of your body injured?

A. The back of my arms were.

Q. Would you indicate it?

A. The back of this arm was burned, where the sleeve came down to, and my glove didn't quite meet it.

Q. Would you show that to the jury?

A. This one not so much (indicating) across the back here.

Mr. A. L. Maslan: Your Honor, may the bailiff present the plaintiff to the jury?

The Court: You may stand in two or three different positions before the jury.

The Witness: That is where it burned, on the back of my wrist.

The Court: Do not use any words, just exhibit the arm or arms.

Q. Would you show the jurors the scars on your face [93] near your nose so they can look at them? I notice you opened your mouth. Why did you do that?

A. Because that is drawn together, and it has drawn on my eyelids.

Q. Is that painful?

A. It hasn't hurt so much now, but it was very much when I opened my mouth.

(Testimony of Oscar Virgil Haynes.)

Q. When you were in the hospital, what treatment did the doctors give you after the first few days?

A. They used penicillin packs on my face a lot, and for my eyes I don't know what it was.

Q. How long after you came home, which was in April, the 18th, 1948, were those scabs still on your face, do you remember?

A. Yes, sir. They was there until about the middle of August, or the last.

Q. Of what year?

A. Of the same year.

Q. And your face has been somewhat like this since that time? A. Ever since.

Q. How long was it after you were brought to the hospital that you actually regained consciousness so that you could think as to what your position was?

A. It seems about two weeks. [94]

Q. Do you remember what your feelings were at that time?

A. Do you mean up to that point?

Q. As soon as you were able to think about your situation, what were your feelings?

A. I was scared because I couldn't see nothing, and I figured I was going to be that way all my life.

Q. Do you feel better now about your position?

A. Somewhat.

Q. What were you wearing at the time of the accident?

A. I was wearing an Army shirt that I had

(Testimony of Oscar Virgil Haynes.)

brought home from the service with me, that we were discharged in, and a pair of pants, what they call tin pants out here in the northwest for rainy weather, very heavy cloth.

Q. Were you wearing gloves?

A. Yes, sir, I was wearing leather gloves.

Q. Did you wear a hat?

A. A bill cap and a pair of Army combat boots that I had also brought home with me.

Q. Since the time of the accident, have you been engaged in any type of work at all, Oscar?

A. No, sir.

Q. Why is that? A. I can't trust myself.

Q. How is your health outside of the face and eyes? [95] A. Fine.

Q. Have you ever been sick? A. No, sir.

Mr. A. L. Maslan: Take the witness, counsel.

Cross-Examination

By Mr. Preston:

Q. How long had you been working for Radinsky & Company at the time of this accident approximately?

A. From Labor Day, 1946, until February 20, 1948.

Q. Approximately a year and a half?

A. Yes, sir.

Q. During that time, you were doing trucking and also working in the yard? A. Yes, sir.

(Testimony of Oscar Virgil Haynes.)

Q. Do you know whether or not you were carried on the rolls of B. Radinsky Company as a workman engaged in extra hazardous employment? Do you know that yourself?

A. I knew I was covered by insurance.

Q. By workman's compensation insurance?

A. I believe that is what they call it.

Q. The state law, in other words?

A. Yes, sir.

Q. During the year and a half, do you know whether or not your employer, B. Radinsky Company paid premiums? [96]

Mr. Ben Maslan: I think that is a question that was going to be reserved for discussion.

The Court: That subject was to be reserved, as I understand it.

Mr. Preston: I can ask him later about that, if necessary, so I will not cover that point at this time.

Q. Mr. Haynes, just before the accident, did you hear your helper, Mr. Huston Hubbard, discussing with someone else the question about this coil, whether or not it had been flushed out?

A. No, sir. I was some distance from him.

Q. Do you recall that they were discussing something about the pipe? A. Not them two.

Q. You don't remember?

A. Mr. Powser was talking to somebody else, a man that I didn't know.

Q. Since you got home from the hospital, have

(Testimony of Oscar Virgil Haynes.)

you done anything about going to school to help your condition, occupy yourself and learn things at Edison or Broadway, those schools that help you out when your eyesight is not good?

A. No, sir, not now.

Q. Have you at all? A. No, sir. [97]

Q. What they call, I believe, occupational therapy or anything like that? A. No, sir.

Mr. Preston: That is all.

Redirect Examination

By Mr. A. L. Maslan:

Q. That load that you went to take from the Powser yards, was that the first load that you had taken of this pipe and various other scrap materials? Had you taken other loads from the Powser yard?

A. Yes, sir, we had taken numerous loads from there.

Q. The immediate few days before the accident?

A. Yes, sir.

Q. Did those loads also consist of pipe and various other materials? A. Yes, sir.

Q. That is, different pipe materials and scrap?

A. Yes, sir.

Mr. A. L. Maslan: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness. [98]

WILLARD BAARSTAD

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Willard Baarstad.

(Photograph marked Plaintiff's Exhibit 14 for identification.)

Q. Where do you live?

A. 6556 Dibble Avenue, N. W.

Q. Willard, is it? Oscar called you Willie.

A. Yes.

Q. Do you know Oscar Haynes?

A. Yes, I do.

Q. How long have you known him?

A. Since August, 1944.

Q. How did you first become acquainted with him?

A. We were inducted into the Army at the same station, the Field Armory.

Q. I beg your pardon? [99]

A. We were inducted in the Army at the Field Armory the same day.

Q. How old were you at that time?

A. Eighteen.

Q. Was he the same age? A. Yes.

Q. Did you serve with him in the Army?

(Testimony of Willard Baarstad.)

A. Yes.

Q. Did you take your indoctrination course together? A. Yes.

Q. Where was that?

A. Fort Lewis, Washington.

Q. How long were you together with him there?

A. Approximately three weeks, I guess, two or three weeks.

Q. Where did you go from there?

A. Camp Roberts, California.

Q. Did he go down there with you?

A. Yes.

Q. How long did you serve at Camp Roberts together? A. Approximately six months.

Q. What happened thereafter?

A. Well, we went on furlough before entering service overseas.

Q. Did you get overseas the same time as he did?

A. No, I left January, 1945.

Q. When did you next see Oscar Haynes?

A. The latter part of March, 1948.

Q. Where did you then see him?

A. In the 35th Regiment of the 25th Division.

Q. Where was that? A. On Luzon.

Q. Had you been in active duty, that is combat duty already? A. Yes.

Q. When did Oscar Haynes come to your outfit?

A. The latter part of March, 1945.

Q. Where was that? A. On Luzon.

Q. Is that the island of Luzon? A. Yes.

(Testimony of Willard Baarstad.)

Q. Is that in the Philippines? A. Yes.

Q. Did you see Oscar often from March when he came into your outfit to the end of the war?

A. Yes.

Q. Under what occasions did you happen to see him? A. Well, I was a cook at the time.

Q. What's that?

The Court: A cook, is that what you said? [101]

The Witness: Yes. I was a cook at the time he joined our outfit and he became a gunner on an M 7 and he would go out on missions in the morning. I seen him before he left and I seen him when he returned in the evening.

The Court: What materiality has this, Mr. Maslan?

Mr. A. L. Maslan: I wanted to show his physical condition, how active he was, Your Honor, and the type of person he was prior to this accident. Here is a young man who served with him for two years.

The Court: Is there any dispute of that, any issue of that, that he was active beforehand?

Mr. A. L. Maslan: There may be. I think that is plaintiff's case, your Honor.

The Court: Get at it briefly.

(Photograph marked Plaintiff's Exhibit 15 for identification.)

Q. I am handing you Plaintiff's Exhibits 14 and 15. Would you tell the jury what those two exhibits are? Do you remember that picture? Ex-

(Testimony of Willard Baarstad.)

hibit 14? A. I don't remember Exhibit 14.

Q. Can you identify any of the people in that picture? A. Yes.

Q. Who are they? [102]

A. Well, I am one of them, one is George Crofton, one is Oscar Haynes, and the other is Lewis B. Anderson, all in the same outfit.

Q. All soldiered together? A. Yes.

Q. Do you remember where that picture was taken? A. Exhibit 14?

Q. Yes.

A. No, I don't quite recall the time.

Q. Take a look at the other exhibit, Exhibit 15?

A. Exhibit 15 was taken in Japan.

Q. Who was in Exhibit 15?

A. Myself and Oscar Haynes.

Q. Looking at Exhibit 14, is that a fair representation of Oscar when you were in the Army together? A. Yes, it is.

Q. How about Exhibit 15?

A. Yes, that is also.

Q. To your knowledge, was Oscar very active?

A. Yes, he was quite active.

Mr. A. L. Maslan: I offer these two exhibits in evidence.

Mr. Preston: They are cumulative, if Your Honor please.

Mr. A. L. Maslan: That is all we have. [103]

The Court: Is this all you have?

Mr. A. L. Maslan: Yes, Your Honor.

(Testimony of Willard Baarstad.)

The Court: These two are admitted, Plaintiff's Exhibits 14 and 15.

(Plaintiff's Exhibits 14 and 15 received in evidence.)

Q. To your knowledge, was he good with guns, the use of guns? A. Yes, he was.

Q. Were his eyes in good condition, to your knowledge? A. To my knowledge, they were.

Q. What makes you come to that conclusion?

A. Well, we went through training together. We would go out on these ranges, firing ranges, and he usually made a pretty good score.

Q. Was he your superior officer, non-commissioned officer?

A. He was in Japan for some time.

Q. What's that?

A. He was in Japan for a few months.

Q. What rating did he finally make over there?

A. Staff sergeant.

Mr. A. L. Maslan: Take the witness, counsel.

Mr. Preston: No questions. [104]

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

JACK RADINSKY

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. My name is Jack Radinsky.

Q. What business are you in?

A. We are in the waste materials business.

Q. Do you have any specialty of waste materials? A. Scrap paper and scrap iron.

Q. Where is your business located?

A. 2750 Fourth Avenue South.

Q. Under what name?

A. B. Radinsky & Son.

Q. Where do you live?

A. 615-33rd Avenue, Seattle, Washington.

Q. Who is B. Radinsky?

A. B. Radinsky is my father. [105]

Q. And you are the son that is in the company?

A. That's right.

Q. Do you know Oscar Haynes?

A. Yes, I do.

Q. Do you know the Haynes family?

A. Yes, I do.

Q. Is the father still working for you, George Haynes? A. Yes, he is.

Q. How long has Oscar been working for you?

(Testimony of Jack Radinsky.)

A. Well, Oscar worked for us from early in September until the date of the accident.

Q. Of what year? September of what year?

A. 1946 until February 20, 1948.

Q. Under what circumstances did he come to work for you?

A. We were in need of a crane operator. We called up the union hall. They sent down Mr. George Haynes. Accompanying Mr. George Haynes was his son, Oscar, and we asked Oscar to come to work for us, too.

The Court: From what date? Will you repeat for our convenience the dates from which to which he worked for you?

The Witness: From the first week of September until February 20, 1948.

The Court: September of what year? [106]

The Witness: 1946.

The Court: September, '46, until February, 1948, is that right?

The Witness: That's right.

Q. Would you state the circumstances of his going to the Powser yard to pick up some iron for you on February 20, 1948?

A. All through the year 1947, we had been picking up scrap iron from Mr. Powser. There were many, many loads, possibly amounting to 500 tons, and on that particular day Oscar Haynes was instructed to go to Tacoma along with his helpers to pick up what was possibly the last load of this

(Testimony of Jack Radinsky.)

particular transaction. He left early in the morning.

The next I heard of Oscar was when the telephone rang approximately 12:15 of that day. My father answered the telephone in my presence. It was in our office, and a Tacoma doctor was on the other end of the line. He said that Oscar was hurt, that he wanted to see us, this doctor wanted to see us at the Tacoma General Hospital.

We ran out to my father's car and by driving at an excessive rate of speed, approximately 90 miles an hour, we managed to reach the hospital in 25 minutes from our place of business. While my father was talking to the doctor I went in to Oscar's room. I saw that he was being held down by some nurses to keep him from rubbing his eyes and that he [107] was crying, "I want my daddy." That is all he was saying, he wanted his father.

Then after that I went out into the hall and I saw Mr. Powser in a state of great excitement. We were all rather excited, and he kept repeating the fact that there was blood in his car. He wanted me to come out and take a look at the blood that was on the floorboards of his car, and I went out with him and I saw that there was blood on the floorboards of his passenger car.

Then after that I went back and talked to the doctor. The doctor didn't know whether it was lye or sulphuric acid. Then I remember the nurse coming in and said, "Doctor, I think he swallowed some of that stuff," and the doctor said, "Oh, my

(Testimony of Jack Radinsky.)

A. Well, Oscar worked for us from early in September until the date of the accident.

Q. Of what year? September of what year?

A. 1946 until February 20, 1948.

Q. Under what circumstances did he come to work for you?

A. We were in need of a crane operator. We called up the union hall. They sent down Mr. George Haynes. Accompanying Mr. George Haynes was his son, Oscar, and we asked Oscar to come to work for us, too.

The Court: From what date? Will you repeat for our convenience the dates from which to which he worked for you?

The Witness: From the first week of September until February 20, 1948.

The Court: September of what year? [106]

The Witness: 1946.

The Court: September, '46, until February, 1948, is that right?

The Witness: That's right.

Q. Would you state the circumstances of his going to the Powser yard to pick up some iron for you on February 20, 1948?

A. All through the year 1947, we had been picking up scrap iron from Mr. Powser. There were many, many loads, possibly amounting to 500 tons, and on that particular day Oscar Haynes was instructed to go to Tacoma along with his helpers to pick up what was possibly the last load of this

(Testimony of Jack Radinsky.)

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(Testimony of Jack Radinsky.)

God," and then my father and I went back to the Powser yard. We noticed that the coil was still on the truck and we ordered the coil to be taken off. Then I got into the truck and I drove it back to Seattle. As I parked the truck in our yard, I noticed that the acid had eaten off the paint off the rear end of the truck. My father and I visited Oscar every chance we could and he didn't seem to be comfortable at all for three weeks. He seemed to me to be in great pain. It was only at the end of the third week that he was able to relax at all.

Q. Did you have occasion to see him at a later date in the hospital? [108]

A. Yes, I visited him several times after that.

Q. What was his condition on the later dates?

A. Well, in the first two or three weeks, his face was so swollen that he was hardly recognizable, but at the later dates his face returned to its normal shape, but his vision was very poor. He could hardly see at all out of one eye. Then I visited him, I believe, the Sunday when he was to be taken home.

Q. What type of a worker was Oscar?

A. Oscar was a good worker.

Q. Did he have any bad habits to your knowledge?

A. To my knowledge he did not smoke or drink.

Q. Was he always on the job?

A. Yes, he was very punctual. He performed his duties cheerfully, he cooperated with both my father and myself and the other employees.

(Testimony of Jack Radinsky.)

Q. What were the nature of his duties?

A. At the beginning, he was what is known as a hook tender, in other words, he put slings around heavy material that was to be lifted by the crane. Then afterwards when we saw that Oscar Haynes had certain capacities that could give him a good future in our business, my father and I tried to shift him around in various departments so that he could learn the business better with a view to assuming a managerial capacity afterwards. [109]

Q. How many employees did you have at your place?

A. Now or at the time of the accident?

Q. At the time of the accident, how many did you have?

A. At the time of the accident we had 20.

Q. How many do you have now?

A. We have 12 now.

(Payroll records marked Plaintiff's Exhibits 16, 17 and 18 for identification.)

Q. Would you peruse Exhibit 16? That shows the earnings, I believe, of Oscar Haynes for the year—what would you state that exhibit is, please?

A. This is the record—this is our payroll record of Oscar Haynes for the year 1947.

Q. What did he earn in the year 1947?

A. He earned \$2996.81.

The Court: What year was that?

The Witness: In 1947.

(Testimony of Jack Radinsky.)

Q. In the first six weeks of 1948 from January 1st to February 20th, 1948, what did Oscar earn working for you? A. He made \$550.20.

The Court: What period?

Mr. A. L. Maslan: From January 1, 1948, to February 20, 1948, at the time of the accident. [110]

May it please Your Honor, may this witness be excused for a few minutes? Dr. Jensen is here.

The Court: Yes, the witness may be withdrawn from the stand and you may call the doctor.

DR. CARL JENSEN

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Dr. Carl Jensen.

Q. How long have you been practicing medicine?

A. In Seattle since 1934.

Q. Where before that?

A. As a resident surgeon in Philadelphia and in Baltimore since 1931.

Q. You have a specialty, Dr. Jensen?

A. Yes, sir, ophthalmology.

Q. I beg your pardon?

A. Ophthalmology or eye work, eye surgery.

Q. You do only eyes now, don't you? [111]

A. Yes, sir.

(Testimony of Dr. Carl Jensen.)

Q. How long have you been engaged as an eye surgeon and doing eye work?

A. Since 1932.

Q. What school did you graduate from?

A. University of Maryland.

Q. As a medical graduate? A. Yes, sir.

Q. Where did you do your specialty work in eye work?

A. Wills Eye Hospital, Philadelphia, 1932 to 1934, and further post graduate work in 1936 and 1938 in Europe.

Q. What city?

A. Various cities, Vienna, Utrecht.

Q. Did you specialize in eye work while you were in the service? A. Yes, sir.

Q. How many years of that did you have?

A. Three and a half years.

Q. You were in the Navy? A. Yes, sir.

Q. Did you have occasion to treat Oscar Haynes?

A. Yes, sir.

Q. For his eye difficulty? A. Yes, sir.

Q. Would you state when you first had occasion to [112] treat him?

A. He was first seen in my office April 19, 1948.

Q. How did he happen to come to you?

A. He was referred to me by Dr. Walter Cameron of Tacoma, I presume because it was more convenient to be treated in Seattle than in Tacoma.

Q. What condition did you find his eyes to be in at that time, April 19, 1948?

(Testimony of Dr. Carl Jensen.)

A. When he was first seen, at that time he showed the late results of the burns of his face and also the burns of his eyes, that is, of the surface of his eyes, the cornea, and there was no treatment indicated at that time other than time. In other words, time was the chief factor in healing. There was no medication particularly involved from my standpoint.

Q. What did you find, that is, what damage did you find to the eyes?

A. At that time, there was rather extensive cornea changes, irritation of the cornea, that is the front surface of the eye, with considerable redness due to new vessels forming there, but this condition gradually subsided leaving chiefly a scar of both corneas well towards the center of the cornea. His vision, the last vision taken on November 9th, showed a vision of 22 hundredths in the right eye and slightly less than 22 hundredths in the left eye. This [113] vision is slightly improved in the dark where the pupil has an opportunity to dilate and it becomes a little bit worse in brighter light when the pupil contracts and the scar is more definitely over his direct line of vision.

Q. How much loss of vision, if any, would you say he has sustained to his eyesight.

A. At the present time based on 22 hundredths, under the state law, that would be classified as 80 per cent loss of vision, under the state of Washington ruling.

(Testimony of Dr. Carl Jensen.)

Q. In relation to industry, what is his incapacity to see, Doctor?

A. With his present vision, he would be classed as industrially blind.

Q. What is the present prognosis as far as you could ascertain from your treatment of the boy?

A. It is rather difficult to estimate what his final vision will be. I feel that that should improve with time without any treatment. In other words, he has about another year to go where there should show some definite improvement in that the scar should contract.

If that does not work, there are other things that can be done. One is some beta radiation, a deep form of radium therapy to dry up those blood vessels and cause the scar to contract. The last alternative would be to do a partial keratectomy or a partial corneal transplant, which [114] probably would likely improve, but he certainly should have some improvement of vision over what he has at the present, but it may take quite a while. I do not think surgery should be contemplated for at least a year, if at all. That is something you cannot determine until the year is up.

Q. You saw him first in April of 1948?

A. Yes, sir.

Q. And you saw him last November 9, 1949?

A. Yes, sir.

Q. A year and a half later. Did you see any

(Testimony of Dr. Carl Jensen.)

marked improvement in his vision in that length of time?

A. No, sir. His vision did improve from the very first visit, but his vision was checked on January 1st or the first part of January, I don't have the exact date, 1949. His vision was 20-70 in the right eye and 21 hundredths in the left. His vision apparently became worse in the interim. That, of course, doesn't mean too much. It does show that his vision hasn't improved, but I still feel that his vision should improve with time.

Q. Even though it will improve somewhat, will there nevertheless be impaired vision?

A. I think so, yes, sir.

Q. And your thoughts about improvement are still speculative as far as you can see?

Mr. Preston: I object to that as leading. [115]

The Witness: Yes, sir.

The Court: The objection is sustained.

Q. Would you say that your statement, Doctor, that the eyesight might improve is based on any definite foundation of fact, or what leads you to that conclusion?

A. The fact that there is a scar over the center of his cornea, and most scars of that type do tend to contract. It is true he will have a definite loss of vision but it is impossible to guess how much loss there will be at this time. One can assume that at present there is quite a little loss of vision.

(Testimony of Dr. Carl Jensen.)

Q. Would you say that it is possible that the vision may not improve?

A. Yes, sir, that is possible.

Q. You mentioned a partial corneal transplant, is that the word? A. Yes, sir.

Q. Would you explain that to the jury, please, and what the chances are of success in that type of operation?

A. Well, there are two types of corneal transplant. One is a full thickness transplant where one takes about a five to six millimeter section of an eye, in other words, an eye that has been obtained from an eye that is to be removed as a result of a tumor, or at least it has to be removed, or an eye from some person that has just died. [116] That is a full thickness and that is sewn in place of—the scar is removed and then this portion of cornea is sewn back in place.

A partial keratectomy is where one takes—instead of going completely through the cornea, they take a half layer or three-quarter layer of cornea and that in turn is inserted in a similar bed on the receiving eye. The reason for the partial corneal transplant, it is recently—the later work has shown that they are a safer procedure and the results have been probably a little bit better than the full thickness corneal transplant.

Q. Are the results guaranteed?

A. No, sir.

Q. By that, what do you mean?

(Testimony of Dr. Carl Jensen.)

A. Statistics show probably 50 per cent improvement, 50 per cent success.

Q. Would you say it is possible that even this corneal transplant may not be successful?

A. Yes, sir.

Q. Is there any pain to Oscar as far as you know, in his eyes at the present time?

A. I don't believe there should be any pain.

Q. From your history and from your conversations with Dr. Cameron, are you familiar with the type of injury Oscar sustained? [117]

A. Only to the extent that I understand he had—acid was blown into his face with the resulting surface burn of his face and eye.

Q. From your experience as an eye man, would you say that acid burns in the eye are painful?

A. I should imagine it would be extremely painful.

Mr. A. L. Maslan: You may take the witness.

Cross-Examination

By Mr. Preston:

Q. As I understand it, what is causing this impairment of this lad's vision is this scar?

A. Yes, sir.

Q. And you feel, do you not, as I understood your testimony, that give nature another year and that scar should contract, by that I mean become smaller and consequently the vision would be improved by that? A. Yes, sir.

(Testimony of Dr. Carl Jensen.)

Q. Is there any reason you have for believing that that will not happen, that that will not follow in this case?

A. Yes, because it is impossible to determine ahead of time the extent of—we will call it the contracture and absorption or disappearing of a scar.

Q. Possibly you didn't understand my question.

A. It is an impossible thing to predict how much contracture you will get.

Q. Possibly you didn't understand my question. My question was, is there anything that would indicate to you, make you believe now that that is not going to happen, that the scar will not contract?

A. The only thing that one would feel that it is not going to contract further is the time. It is true the time already has been, we will say—the acute phase has been finished. In other words, the acute phase, for the first few months the eye was very red and painful, very red, we will say, showing considerable reaction. After a while it goes into a subsiding stage where the blood vessels that have come in as healing agents gradually disappear and, we will say, withdraw. They draw back to the certain portion of the eye we speak of as towards the limbus. In that process, the scar, we will say, shrivels or tends to thin out and disappear. In this case, it has not done that completely although it has shown a vast improvement from the amount of scar there when I first saw him.

(Testimony of Dr. Carl Jensen.)

Q. Is there anything, any reason why that improvement should not continue?

A. The time element. In other words, this first year has been—the greatest portion of that contracture will take place during that first year, we will say, and from then [119] on another year, another year and so on, there will be continued contracture of the scar.

Q. That is what you normally expect, isn't it?

A. Yes, sir.

Q. And that is one reason why, I suppose, you wait before you do any operating, is to see what nature will do in this ensuing year to help you, isn't that about it?

A. Yes, sir.

Q. What was the name of the operation you do to remove the scar?

A. Keratoplasty or keratectomy. Kerato is another word representing the cornea. In other words, it is a Greek word that has been used. The two words, cornea and kerato are used together, intermingling.

Q. Is that an unusual operation or is it one such as you yourself find occasion to perform fairly often?

A. You wouldn't say often, probably one or two a year of that particular type.

Q. It isn't what you call a rare operation?

A. Not any more.

Q. Counsel asked you if you could guarantee that. I don't imagine doctors guarantee the results of any operation?

A. No, sir.

(Testimony of Dr. Carl Jensen.)

Q. Is that what you meant? [120]

A. Yes, sir. In doing keratoplasty, I am speaking from statistics, 50 per cent of them will cloud over after you have removed—in other words, the clear section that you replaced to the eye will cloud over just as bad as the section that you had removed originally.

Q. You, of course, haven't any way of telling whether this would be successful or unsuccessful?

A. No, sir.

Q. You would speculate, I presume, either way?

A. Yes, sir.

Q. But assuming that it was successful, would it improve the young man's vision?

A. Yes, sir.

Q. I believe you said that it would still leave it impaired, but I am not certain in my own mind I understood you as to whether the improvement would be a great deal or merely slight?

A. If it were a good clear perfect result, his vision would come back to within 5 or 10 per cent of normal.

Q. That is, if you got a good——

A. A good result. Maybe some cases go completely back to normal.

Q. Do you get good results sometimes from those operations?

A. Yes, sir, but that, as I say, you refer back to within 5 per cent of normal vision or even better than that. You can return to 20-20 vision which is

(Testimony of Dr. Carl Jensen.)

considered normal. We will say that is a normal sight.

Q. I take it that this young man can look forward, at least hope for an operation which will bring his vision back to practically normal?

A. That is possible. I must say one thing in this, that if his vision does improve to, say, 20-60 or 20-70, which is, we will say, a fair workable vision, although it is slightly impaired, the general feeling among the eye men now is that one shouldn't do a keratoplasty operation for the simple reason there is that slight danger of having a failure. In other words, if a man has a practically useful vision, they wouldn't feel it would be justifiable to subject him to an operation that has a certain amount of danger to it.

Q. In other words, if nature within the next year reduces that scar so that the young man has—did I understand you to say 20-60?

A. 20-60, 20-50, workable.

Q. Then—— A. Forget it.

Q. Forget it, because I guess a lot of us have just that, haven't we?

A. Not a lot, lots of people have, they get along very well, 20-60. You could probably—you should have to have some type of magnifying lenses or magnification, thick lenses of some sort.

Q. You mean he would have to wear glasses?

A. It would be more than glasses with 20-60. To read well, you have to have 20-20 to 20-30 vision.

(Testimony of Dr. Carl Jensen.)

Q. Do you mean without glasses?

A. With or without glasses.

Q. Would glasses correct 20-60?

A. No, if he had 20-60, I am speaking of that as his best corrected vision. I meant his corrected vision would be 20-60, and that isn't quite satisfactory to read ordinary print unless one used some type of magnifying, something that would increase the image that he is reading.

Q. Would a man with that vision, in your judgment, in your experience, be industrially employable such as trucking and so forth, hard work?

A. It depends on the type of employment. There are many types of employment that he would be able to carry on. I do not think they would allow him to drive a truck with 20-60. I think the state law now is better than 20-50, correctible to better than 20-50. Even that is—well, skip that.

Q. Eliminate the trucking. Otherwise, would you say——

A. I would feel there are many occupations that could [123] be carried on.

Q. Is the operation you spoke of, is that the same thing as iris?

A. Iritoection. I didn't get into that phase of it. An iritoection could be done. That is a kind of widening the pupil, bringing an opening to the side of the scar.

Q. Would that show——

A. There is a possibility of that improving his

(Testimony of Dr. Carl Jensen.)

vision. That would be another possibility that would have to be checked.

Q. Is that an operation that is done fairly often?

A. Yes, sir.

Q. With good results?

A. It is a simpler operation, and in the right eye, if the scar appears to be in the right spot, sometimes they gain quite a bit of vision.

Q. In your judgment would that be another possible solution?

A. That is a possibility that would have to be checked in about a year, and that may be a very likely possibility in his case.

Q. I didn't quite understand. Would such an operation as that if successful produce any better results than the one you first spoke of? I don't know the name.

A. It depends on the extent. If his scar contracts [124] some more, then the iritoectomy operation would be very advisable. If it does not, then you have to resort to a corneal transplant, for the simple reason that in doing your iritoectomy you don't have quite enough clear area left to let the person see through out of that new pupil. We will call it that, that is what it amounts to, a new pupil in the eye.

Q. In either event. your best judgment would be to wait this year and see how nature behaves?

A. My recommendation would be that he wait,

(Testimony of Dr. Carl Jensen.)

and he can have a beta radiation or X-rays sometimes. They use beta rays over X-rays.

Q. You mean those are methods of helping nature in the meantime?

A. Yes. Then at the end of that time, one would have to determine whether an iritoectomy would be of any value.

Q. Have you prescribed for him these aids to nature?

A. Not yet, no, sir.

Q. Have you been treating him right along?

A. I have been observing him. There hasn't been any treatment indicated.

Q. But you feel that now is about the time to start?

A. I think most any time. As a matter of fact, I hadn't seen him for a month or so, but I would say in a month or two it would be well to start that.

Q. These aids to nature's contracture?

A. Yes.

Mr. Preston: That is all.

Redirect Examination

By Mr. A. L. Maslan:

Q. But as you stated, all of these treatments that you indicate, all of these keratoplasties and iritoectomies and beta ray treatments, or any improvement that might be garnered by the use of these various operative techniques are still all possibilities, aren't they?

(Testimony of Dr. Carl Jensen.)

Mr. Preston: Objected to as leading and suggestive.

The Court: The objection is overruled, but avoid all possible leading. You should say is it or is it not a fact that so and so. That would be one proper way of doing it, perhaps better than the way you last used. Try to avoid unnecessary leading.

Q. Is it not a fact that these keratoplasty operations and iridectomies counsel mentioned and beta ray treatments that may be given still might result is no assistance to the eye vision?

A. That is possible, that is always possible.

Q. And you mentioned that this keratoplasty that you might suggest in a year from now is at best no more than a [126] 50 per cent cure of vision, is that not so?

A. Yes, sir, according to statistics.

Q. And that there may develop a cloudiness by this operation which will make for an unsuccessful operation?

A. That is always a chance one would have to take.

Q. When that happens, would the slight vision that he has become worse or would it remain as it is?

A. It would probably remain as is. It could—anything can happen, of course—it could get worse but that is rather remote.

Mr. A. L. Maslan: That is all.

(Testimony of Dr. Carl Jensen.)

Recross-Examination

By Mr. Preston:

Q. In other words, as I understand it, if these operations or either of them are performed, the young man doesn't stand to lose what vision he has?

A. Yes, sir.

Q. Does he stand to lose it or do you expect him to lose it? Is he taking a chance, that is what I am getting at, too much of a chance?

A. I think whatever doctor does it would be very cautious and minimize that chance, but there is always a chance of failure of any operation. Infection may come on, and in other words, a person to go into an operation of that [127] type should be advised of the seriousness of it.

Q. My question is prompted by counsel's suggestion, perhaps if this operation wasn't successful that he wouldn't retain the vision that he has, but would lose that, and I understood you to say that wasn't necessarily probable?

A. That is rather unlikely, that he would lose further vision.

Mr. Preston: That is all.

Redirect Examination

By Mr. A. L. Maslan:

Q. But it is probable?

A. Anything is probable like that.

(Testimony of Dr. Carl Jensen.)

Mr. Preston: Did you say probable or possible?

The Witness: I will correct it. Anything is possible, would be better, not probable.

Mr. Preston: Not probable but possible.

Q. But as you suggested in your cross-examination, that the best you can get from the natural improvement, if it will naturally improve, is 20-60, is that right?

A. That would be a fair guess at this point. It is impossible, as I use the word guess, to guess what the improvement will be.

Q. It is possible that there may not be an improvement, isn't it? [128]

A. It is possible.

Mr. Preston: That has been gone over again and again. It is repetition.

The Court: Sustained. Avoid repetition.

Q. Doctor, did you submit a bill for your services rendered?

A. No, sir. Oh, I think there has been some bill to the state, yes, sir. I guess the girl has taken care of that.

Q. Do you know what that bill was?

A. No, sir. Just guessing now, for the times I have seen him for the State?

Q. How much was your bill?

A. To the State, to date, I think it was \$39 or something. I don't know.

Q. I believe this is proper, if I might ask this

(Testimony of Dr. Carl Jensen.)

question. What in your estimation would these operations come to in the event——

A. That is impossible to state, because your operations run anywhere from nothing to \$1000, whatever the patient has. That would be difficult to state because one has to consider the situation of the individual being operated.

Q. Have you recently done a corneal transplant?

A. Yes, sir.

Q. Have you submitted a bill for that? [129]

A. That most recently was done for nothing, but that varies, your fee will vary anywhere from, we will say \$500. It depends on the individual, you cannot say what the fee will be.

The Court: You may step down.

(Witness excused.)

The Court: The doctor is excused and may retire when he wishes. Call the next witness. The witness, Radinsky, will resume the stand.

JACK RADINSKY

Direct Examination

(Continued)

By Mr. A. L. Maslan:

Q. You had reached Exhibit 16, I believe. You were testifying in relation to the earnings of Oscar Haynes for the year—you testified that he had earned \$2996 and some cents for the year 1947?

(Testimony of Jack Radinsky.)

A. That's right.

Q. And you had also testified, I believe, that from January 1, 1948, to February 20, 1948, he had earned some \$550 and some cents?

A. That's right.

Q. Did anyone take his job after he became incapacitated? [130]

A. Yes, we hired another man after the accident occurred.

Q. Who was that man?

Mr. Preston: Objected to as immaterial, if the Court please.

The Court: Why is the identity of the man——

Q. Well, did some man take his place?

A. Yes, another man took his place.

Q. What did that job pay for the balance of the year, 1948?

Mr. Preston: That is not material, if the Court please, what somebody else earned. They have shown what this young man earned in the past. What somebody else earned at that job is an entirely different matter, different condition, has no bearing on this.

The Court: Establish similarity of conditions.

Mr. A. L. Maslan: I will show the same position, absolutely the same type of work this young man was doing.

The Court: Lay the foundation.

Q. Did someone take the job that he was working at? A. Yes, someone did.

(Testimony of Jack Radinsky.)

Q. Did this successor of Oscar Haynes do exactly the same type of work which he would have done? A. Yes, the same type. [131]

Q. What work did he do?

A. Truck driving.

Q. Was that the same job Oscar had?

A. On the same truck, yes.

Q. If Oscar had been there, would he have done the same work? Would you have used him instead of his successor?

Mr. Preston: That is objected to as leading and suggestive.

The Court: I will overrule this, but I think you could get at it by one question; if he had remained on the job, how much would he have earned?

Q. If Oscar had remained on the job for the balance of the year 1948, how much would he have earned in addition to the \$550 that he did earn?

A. He would have earned at least \$3500 more.

Q. How much would he have earned during the year 1949 to date?

Mr. Preston: That is too remote.

Q. If he had continued the job?

Mr. A. L. Maslan: May it please your Honor, I do not think that is too remote.

The Court: The objection is overruled, in view of the last addition to the question.

The Witness: The year 1949, this year just coming [132] to a close?

Q. Yes. A. He would have made \$4500.

(Testimony of Jack Radinsky.)

Q. Were you at all times satisfied with Oscar's services prior to his injury?

A. Yes, we were.

Q. Was there a probability that you would have kept him on? A. A great probability.

Mr. A. L. Maslan: Take the witness.

Cross-Examination

By Mr. Preston:

Q. For the purpose of testifying later, would you bring the records that you were subpoenaed to bring? A. Yes, I have them.

Q. Will you remain in attendance until this other matter, until you are called on this?

The Court: Do not absent yourself from the trial while the trial is in progress without the Court's further consent. You may step down.

(Witness excused.)

Mr. A. L. Maslan: These exhibits were marked for identification, may it please Your Honor. I am offering them in evidence. [133]

The Court: Exhibits 16, 17 and 18?

Mr. A. L. Maslan: Yes, Your Honor, to show the earnings.

The Court: Each of them is now admitted.

(Plaintiff's Exhibits 16, 17 and 18 received in evidence.)

Mr. A. L. Maslan: We will call Mr. Cliffe as an adverse witness.

EDWIN CLIFFE

called as an adverse witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

The Court: State your name for the record?

The Witness: Edwin Cliffe.

Q. Where do you live?

A. At 3908 North 25th Street, Tacoma, Washington.

Q. What is your occupation?

A. I am assistant superintendent of the Tacoma Plant of the Pennsylvania Salt Manufacturing Company.

Q. I beg your pardon? [134]

A. Assistant superintendent of the Tacoma plant.

Q. Of the Pennsylvania Salt Manufacturing Company?

A. Of the Pennsylvania Salt Manufacturing Company of Washington.

Q. Are there any other Pennsylvania Salt Manufacturing companies?

A. There is a parent company.

Q. Where is that located?

A. In Philadelphia.

Q. Is that a foreign corporation? Is your company a Washington corporation?

A. Our company is a wholly owned subsidiary.

(Testimony of Edwin Cliffe.)

Q. Of what state is that, do you know?

A. I believe it is a Delaware corporation.

Q. How many plants does your company have?

A. The Penn. Salt of Washington has three.

Q. In the state of Washington?

A. One in the state of Washington.

Q. Where are the others?

A. One in Oregon, one in Texas.

Q. What are your duties with the Pennsylvania Salt Manufacturing Company?

A. I am in charge of production and of personnel in the Tacoma plant.

Q. What do you manufacture in your plant?

A. It is alkalies and chlorine, basic industrial chemicals.

Q. As assistant superintendent of the Pennsylvania Salt Manufacturing Company, do you have occasion to buy and sell the various pipes that you use in your manufacturing plant?

A. I have occasion to dispose of scrapping, if that is what you have reference to. I do not directly purchase the material.

Q. Where is that purchased?

A. It is purchased through our purchasing department.

Q. That is also in Tacoma?

A. That is also in Tacoma.

Q. But as assistant superintendent, you have the duties of disposing of scrap material, is that right?

A. That is correct.

(Testimony of Edwin Cliffe.)

Q. When do you classify the pipe in your firm as scrap material?

A. In period of time do you mean?

Q. Yes, is that considered, as far as time of usage?

A. Ordinarily, the scrap accumulates over a period of time. There is no set time limit, and it is disposed of when it reaches an accumulation we would like to dispose of.

Q. What do you do with your used pipe and scrap iron? Do you place it in any particular—

A. We store it in two locations in the plant yard.

Q. When you have a sufficient quantity, you call for bids or you sell it outright, is that how you dispose of it?

Mr. Preston: Are you speaking of the present time? I am not clear from your question.

Mr. A. L. Maslan: I am speaking of the course of conduct.

Mr. Preston: I think the question should be made clear as to time.

The Court: Try to state the time as to which you are inquiring.

Q. During the early part of 1948, did you have charge of the disposal of the used pipe, scrap iron in your yard?

A. That is correct, I did at that time.

Q. Do you remember the sale of any of this used pipe or material to the Frank Powser Com-

(Testimony of Edwin Cliffe.)

pany during the early part of January or February?

A. I do remember disposing of some at that time.

Q. Would you look at Exhibits 1, 2, 3 and 4 and 7, 8, 9 and 10? Do you recognize that pipe?

A. I recognize these exhibits.

Q. What do they portray to you?

A. This is what we would call a pipe coil, double pipe heat exchanger, properly named.

Q. And that came from your plant? [137]

A. The coil depicted here? I think so.

Q. Would you describe that pipe and how it is made? What type of pipe does it consist of? What is the material that goes into it?

A. These are as I mentioned what is known as a double pipe heat exchanger. It is a large pipe through which a smaller one is inserted, one without the other, and they are welded at the ends. The inner pipe then carries one fluid and the outer pipe carries a second fluid, usually in counter-current flow. There is a heat transfer between the fluids. One may be hot and the other cold, or vice versa, and the two fluids are separated by the pipe walls.

The Court: What is the objective to be gained by these two different temperature fluids?

The Witness: It is a heat exchanger to transfer heat from one fluid to the other fluid.

The Court: For what purpose?

(Testimony of Edwin Cliffe.)

The Witness: These coils are a common item of manufacture. They appear in the company catalog, among other places. They are sold for the purpose of condensing carbon dioxide, is one illustration in plants. We use them in our plant, have used them in the past for cooling our alkalies and for cooling sulphuric acid and for cooling carbon dioxide.

Q. Ordinarily, what chemical runs through the outer [138] layer in your plant? What chemical do you run through that outer layer of pipe?

A. Ordinarily, the small annular space between the two pipes carries the matter you are cooling, and the inner pipe carries the cooling water. In our instance, it is sea water, and as I mentioned we use this same type of coil, have used them in the past for carbon dioxide condenser, for an alkali cooler and sulphuric acid cooler, any one of the three.

Q. Where would the sulphuric acid run? Would that run through the inner space?

A. It would be through the outer space, the small space between the two pipes.

Q. What is known as the jacket, the outer part?

A. That's right, it would be inside the outer jacket and outside the inner jacket.

Q. During the early part of 1948, you stated that you had occasion to sell some pipe and scrap iron to the Frank Powser Company?

A. That is correct.

(Testimony of Edwin Cliffe.)

Q. Do you recognize that coil of pipe as being part of the scrap that you sold at that time?

A. I believe it is.

Q. Who originally discarded that before the sale? Was it under your supervision or through some other member [139] of the plant?

A. This pipe was in the scrap yard when I returned from the Army and I did not place it in the storage yard.

Q. It was there when you returned?

A. It was there when I returned.

Q. Did you ever have occasion to install that type of pipe in your plant, or any other pipe?

A. I personally did not install, but I supervised the installation of similar coils.

Q. And that pipe comes to you new, does it not?

A. We purchase the coil or fabricate it at our own shops of new material.

Q. That is clean, is it not, when it comes to you?

A. Yes, it is clean.

Q. Did you prior to the sale of this pipe inspect it as to whether it contained any caustic or whether there was any sulphuric acid remaining in it?

A. I did not.

Q. To your knowledge, did anyone do that?

A. To my knowledge, no one did.

Q. When you discard pipe of this nature, do you ordinarily flush the pipe to see that it contains no acid or other caustic?

A. When the pipe is removed from service, it is

(Testimony of Edwin Cliffe.)

customary always to flush whatever chemicals may have been [140] in it.

Q. You say you do not know whether that was done in this case?

A. At the time of removal or at the time of sale?

Q. At any time?

A. I presumed it had been done when it was removed.

Q. But you do not know whether that was done or not?

A. I wasn't there at the plant at the time it was removed.

Q. You did not order it done as far as this pipe is concerned? A. That's right.

Q. And you sold it to Powser?

A. I designated it as one piece of equipment that he was offered to buy. I didn't personally sell it but I designated what he should take.

Q. You told him to take this coil of pipe as part of the scrap that he purchased from the firm?

A. That is correct.

Q. Prior to the time that the pipe had been placed in the scrap heap, had it been a part of your manufacturing system?

Mr. Preston: Just a minute, that assumes something not in evidence, that this was placed in the scrap heap after it was removed from the direct service. [141]

(Testimony of Edwin Cliffe.)

The Court: I believe the scrap yard is where it was put, was it not?

Mr. A. L. Maslan: He stated it was there.

Mr. Preston: In the yard or in the scrap heap?

The Court: I understand there has been some testimony which placed it in the scrap yard.

Mr. Preston: Placed it in the yard, I believe the witness said. My recollection of the testimony is that this was placed in the yard.

The Court: I was saying the same thing, or trying to.

Mr. Preston: I thought Your Honor said scrap yard.

The Court: The yard that was used for storing scrap iron, isn't that what was meant? Mr. Powser, I think, used the expression "left it on the edge of the yard."

Mr. Preston: That was Mr. Powser's yard, Your Honor.

The Court: That is true.

Mr. A. L. Maslan: I think I can straighten it out.

The Court: Proceed.

Q. You have a scrap yard, don't you?

A. We have no place we could designate as the scrap [142] yard, no.

Q. You have a rather large yard, don't you?

A. Our plant covers quite a considerable area, that is true.

Q. You have a spot where you have your ac-

(Testimony of Edwin Cliffe.)

cumulated scrap iron and scrap pipe, isn't that right?

A. Perhaps I can clear this up, if Your Honor please?

The Court: I think it is better to answer the question itself. You might say something one party or the other might object to.

The Witness: We do not have a scrap yard in that term.

Q. Where do you keep your scrap iron and scrap pipe?

A. There are two locations within the plant where we accumulate all iron that may be reused in the plant or may be disposed of as scrap.

Q. In other words, you have scrap heaps? We won't call it a scrap yard but it is a scrap heap, isn't that right?

A. We call it salvage. We attempt to salvage what we can.

Q. Then it is your salvage yard, is that right?

A. I think that is a more proper term.

Q. And you sold this pipe out of your salvage yard?

A. Correct. I designated certain [143] portions of it that would be carried away as scrap. The remainder would be retained as salvage.

Q. When this was discarded, it was scrap, is that right?

A. That is correct.

Q. And to your knowledge it had been discarded, is that right?

(Testimony of Edwin Cliffe.)

Mr. Preston: At what time, please?

Q. At the time of the sale.

A. That was the first disposition of it as scrap.

Q. However, then it was in the early part of February or the latter part of January, at that time you had discarded this coil of pipe as scrap pipe?

A. The day I designated it for sale to Mr. Powser, it became scrap.

Q. What was it before that time?

A. It still was in our yard as a piece of equipment we might find use for.

Q. As possible salvage?

A. As possible salvage.

Q. As soon as the sale was made, you had abandoned the use of it and it became scrap?

A. That is the day I made the decision it was no longer useful, or would probably not be useful and designated it as scrap. [144]

Q. Do you have any idea what this particular type was used for?

A. I wasn't familiar with its particular application. It is of that type, we used them for three different purposes. It may have been any one of the three.

Q. You personally did not know whether it contained any acid or caustic material?

A. I did not personally know whether it contained anything.

(Testimony of Edwin Cliffe.)

Q. You did not warn Mr. Powser in relation thereto, did you?

A. I did not warn anyone that it might contain any chemicals. It was our usual practice to flush them out.

Q. You assumed that it had been flushed?

A. I assumed that it had been flushed.

Mr. A. L. Maslan: That is all.

Cross-Examination

By Mr. Preston:

Q. Do you know how long it had been since this particular pipe that we have been talking about, this coil, had been in use in the plant?

A. From its first installation.

Q. No, how long since it had been out of use, I will put it that way? [145]

A. It would be hearsay, I have no knowledge of when it was removed.

Q. Let me ask you this, when did you come back from the service?

A. I returned in December, 1945.

Q. Were you returning then to the plant or had you been with the plant previously?

A. I had been with the Penn. Salt Company previous to the war.

Q. You returned in what year?

A. December, 1945, and served in the Portland plant. I didn't return to the Tacoma plant until the latter part of 1946.

(Testimony of Edwin Cliffe.)

Q. Were there some materials, including this pipe, that were kept for possible replacements of your system?

A. That is the reason for our salvage yard. We retain all the equipment that may have a further use within the plant.

Q. Would that further use be to take the place of a similar piece that might be defective?

A. That is correct.

Q. Is that because of the scarcity of materials during the war years and the years following the war years?

A. That is what I was told was the reason for retaining this particular coil, that it was a spare the [146] plant operators intend to use if it became necessary.

Mr. Preston: That is all.

Redirect Examination

By Mr. A. L. Maslan:

Q. As a matter of fact, it was an obsolete type of pipe, was it not?

A. It is an older type. We have none like it still in service.

Q. You don't use any more like it?

A. Not of this particular manufacture.

Q. Then what could it replace?

A. The identical type we now have in service, they are interchangeable.

Q. Even though it is obsolete or an older type,

(Testimony of Edwin Cliffe.)

you still could use it, is that correct?

A. That is correct.

Mr. A. L. Maslan: That is all.

Mr. Preston: That is all.

The Court: You may be excused.

(Witness excused.)

The Court: We will take a short recess of about ten minutes.

(Recess.)

The Court: All are present as before the recess.

Mr. A. L. Maslan: There are a few questions I failed to ask Mr. Cliffe. May I recall him please?

The Court: You may. Mr. Cliffe is recalled under the same circumstances he was originally called. Resume the stand for further examination.

EDWIN CLIFFE

recalled as an adverse witness by the plaintiff, having been previously duly sworn, was examined and testified as follows:

Redirect Examination

By Mr. A. L. Maslan:

Q. Mr. Cliffe, you are a chemist, are you not?

A. No, sir. I am a mechanical engineer.

Q. Are you aware of the properties of sulphuric acid?

A. I am.

(Testimony of Edwin Cliffe.)

Q. You have dealt with acid for quite a while, have you?

A. Since my employment with Pennsylvania Salt Company.

Q. What is the concentration of sulphuric acid that you use in this cooling system, and particularly in this type of pipe? What is the strength of it?

A. The acid in service is what is known as 80 per cent [148] sulphuric acid.

Q. Is that considered quite strong from an acid standpoint?

A. That is quite strong from an acid standpoint.

Q. Is it corrosive?

A. Above 80 per cent, strangely enough, it is not very corrosive to metals. That is why we can use it.

Q. How about human beings, is it corrosive to flesh?

A. It is corrosive to flesh.

The Court: What percentage?

The Witness: 80 per cent, sir.

Q. Would you say it is a highly dangerous object to handle?

A. I believe it is so classified in the Interstate Commerce regulations in its handling.

Q. Could you estimate the Ph density of this sulphuric acid?

A. It is clear beyond the Ph range as we know it in, say, high school chemistry.

Q. I beg your pardon?

(Testimony of Edwin Cliffe.)

A. It is beyond the range of the Ph scale in chemistry.

Q. Would you explain what you mean by the PH range?

A. The Ph range, as I recall it from the study of chemistry, is used for classifying whether an object is an [149] acid or an alkali. A Ph of 6 separates the acids from the alkalies.

Q. Wouldn't it be 7 rather than 6?

A. I believe 6 is the dividing point. 7 gets into the——

Q. Isn't 1 to 7 the acid and 8 to 14 is alkali?

A. I believe that is correct.

Q. As it goes down, it is stronger acid?

A. Correct.

Q. In other words, Ph2 means it is a very strong acid; Ph1 is 100 per cent acid, is it not, in strength?

A. I am not sure on that point.

Q. As you get higher, up to 6, it is a very mild form of acid?

A. That is correct.

The Court: How do you describe the strength of this acid which flowed through these pipes, which was in these pipes, as to strength?

The Witness: I would describe it as 80 per cent sulphuric acid. We would not use the Ph range at all.

Q. And you would say that it is highly dangerous?

A. That is a very corrosive acid.

The Court: 80 per cent sulphuric is very corrosive?

(Testimony of Edwin Cliffe.)

The Witness: Yes, sir. [150]

Q. You say it isn't corrosive to metals, this acid of this strength?

A. It is a very small degree at that strength and above it.

Q. What causes these pipes to wear out?

A. It is normal wear and tear. The inner pipe carries salt water, which is slightly corrosive. Both pipes deteriorate over a period of time, a period of years.

Q. Is there a reaction between the sulphuric acid and the metal of the pipe?

A. A slight reaction.

Q. What happens when this reaction takes place, chemically speaking.

A. In service, you are speaking now, as 80 per cent sulphuric?

Q. Yes.

A. It would remove a small portion of the iron of the pipe.

Q. Well, assuming that due to a heavy blow on pipe containing this sulphuric acid—what would cause that sulphuric acid, the chemical, to spew forth with such terrific force?

A. It would be necessary for a pressure to exist within the pipe.

Q. How does that pressure form, do you know?

A. Are we now also speaking of a pipe in service?

Q. Yes.

(Testimony of Edwin Cliffe.)

A. In our plant, we pump the sulphuric acid through there under pressure.

Q. Does oxygen form in there?

A. Not in service at the 80 per cent strength.

The Court: Do you know what substance was in this pipe that broke on the occasion of this accident when the plaintiff was injured?

The Witness: My conjecture is that the substance they describe as a gray mud was ferrous sulphate, which is a combination of sulphuric acid and iron. Ferrous for iron, sulphate for the sulphuric acid.

The Court: Is there anything about its nature which would cause it to spew itself out, the words have previously been used in the case, through the broken parts of pipe?

The Witness: There is a reaction between an acid that will attack iron and the iron which generates a gas; hydrogen, if confined, would generate pressure.

The Court: State what you know with respect to what was the situation here, what actually occurred here?

The Witness: My conjecture would be that that pipe contains some acid which combined with iron to [152] form ferrous sulphate, and in that reaction form hydrogen, causing a pressure, but how it was confined I am not prepared to say.

Q. What acid would combine with the iron to form the ferrous sulphate?

A. Sulphuric acid.

(Testimony of Edwin Cliffe.)

Q. That would be sulphuric acid plus the iron which would make ferrous sulphate and release hydrogen, and the small aperture or opening having been made, the hydrogen would shoot that ferrous sulphate out? A. That is correct.

Q. And that ferrous sulphate is a caustic agent, it is corrosive, is it not?

A. It is an acid corrosive agent.

Q. To your knowledge, had there been an accident of this nature shortly prior to the time Oscar Haynes was injured, that is, an accident of similar nature?

Mr. Preston: That is objected to as immaterial, if the Court please.

The Court: Read the question.

(Last question read by reporter.)

Mr. A. L. Maslan: I should amend that by saying another accident of similar nature.

Mr. Preston: I object to it as entirely immaterial, Your Honor. [153]

The Court: It seems to me that would show the circumstance as being identical or very similar.

Mr. A. L. Maslan: Similar circumstances, I wanted to get that word in.

Mr. Preston: It is still too general, if the Court please.

The Court: That brings in the law originally announced in the old case of *D. C. vs. Arms*, does it not, and the cases that follow that? For the present, the objection is sustained with leave for

(Testimony of Edwin Cliffe.)

counsel during tonight's session that we will have after the jury is excused to show me I am wrong. If so, we will call the witness back for further examination.

Q. At the time that you sold the pipe to Frank Powser, you were at that time aware of the dangerous propensities of sulphuric acid, were you not?

A. That is correct.

Mr. A. L. Maslan: That is all.

Mr. Preston: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness. [154]

WILLIAM A. KUNIGK

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your full name, please?

A. William A. Kunigk.

Q. What is your address?

A. Tacoma Yacht Club, Tacoma, Washington.

Q. What is your occupation, please?

A. Assistant division purchasing agent.

The Court: Where?

The Witness: The Pennsylvania Salt Manufacturing Company, Tacoma.

(Testimony of William A. Kunigk.)

The Court: Assistant what?

The Witness: Assistant division purchasing agent.

Q. As such assistant purchasing agent, did you have anything to do with the sale of the pipe of which you have heard us speak today?

A. Yes, I did, I wanted to see as to getting prices on scrap.

Q. In other words, did you send out for bids?

A. That is correct. [155]

Q. For the purchase of this material?

A. That is correct.

Q. Do you recall suggesting bids for the purchase of this scrap in which this pipe was included?

A. As I recall, I asked for bids on scrap iron which included some pipe and scrap steel.

Q. Did that also include the pipe in question? Will you please look at Exhibits 1, 2, 3 and 4 and 7, 8, 9 and 10?

A. That I couldn't say that that was included, because I never did see the scrap myself.

Q. Where was the scrap, to your knowledge?

A. It was within the confines of our yard.

Q. All the scrap is segregated in one section, is it?

A. There are several places where they bring the salvage material together, and at times that are designated, ask me to get prices on scrap and then they haul away those portions which they no longer feel are usable.

(Testimony of William A. Kunigk.)

Q. Did you have occasion to sell this particular scrap in the early part of February, 1948?

A. Yes, I did.

Q. Who did you sell it to?

A. To Mr. Powser.

Q. Did you sell that material as scrap iron?

A. I did, yes.

Q. Do you have the weight tares and the sales slips? [156]

A. I do not, I believe Mr. Driskell has them with him.

Q. Do you know how long that pipe was in the scrap pile before it was sold? A. No, sir.

Mr. Preston: I object, if the Court please, it assumes that this pipe was——

Mr. A. L. Maslan: I withdraw that.

Q. You stated you were not sure whether that pipe was in that pile or not?

A. No, sir, I don't know.

Q. But it was through your particular agency that pipe was sold to Frank Powser?

A. All I knew, it was scrap steel and pipe.

Q. And it was Mr. Cliffe who actually designated the pipe and the scrap iron to Powser's assistants? A. That's right.

Mr. A. L. Maslan: That is all.

Mr. Preston: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness. [157]

J. M. DRISKELL

called as a witness by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. Your name is J. M. Driskell?

A. That's right.

Q. Where do you live?

A. Horse Head Bay.

Q. Is that in Tacoma?

A. No, that is across the Narrows.

Q. What is your occupation?

A. I am the treasurer of the Pennsylvania Salt Company of Washington.

Q. You have been asked to bring the various sales slips in relation to the sale of iron and scrap to the Frank Powser Company? A. Yes, sir.

Q. Would you produce them, please?

A. I presume, counsel, it is the one on February 24th you are talking about?

Q. Yes. [158]

A. There were other sales to the Powser Company.

Q. You state you have a sales slip showing the sale of various iron and scrap to Powser dated February 24, 1948?

A. I believe that was the date.

(Testimony of J. M. Driskell.)

Q. What was your usual custom in relation to these sales slips? For instance, if there was a sales slip dated February 24th, would that mean that the iron and scrap was delivered on February 24th?

A. Not necessarily. There might be an accumulation of several loads, depending on how long it took the dealer to pick up the material and for the slips to come into the office.

Q. As I understand, it was your custom to get the weight tares, the weight slips and then accumulate them as soon as the whole transaction was completed, then issuing a sales slip for them?

A. That is correct.

Q. Did you do that in this case?

A. I believe so.

The Court: Before referring to the instrument, let it be marked.

(Weight slips marked Plaintiff's Exhibit 19 for identification.)

Q. Would you read off those weight slips and would [159] you identify them, please?

The Court: Do you offer those in evidence?

Mr. A. L. Maslan: I offer this in evidence, Your Honor.

The Court: It is now admitted.

(Plaintiff's Exhibit 19 received in evidence.)

Q. Would you identify that, please?

A. The weight slips attached to the—the exhibit

(Testimony of J. M. Driskell.)

consists of our invoice to the Powser Company and also a shipping memorandum to the Frank Powser Company. Attached to the shipping memorandum is a square ticket.

Q. Would you make known to the jury the dates on these, please?

A. I will, I am just getting around to the description of it.

Q. Go ahead.

A. A weight slip from the Aaberg Fuel Company, dated February 12th, 5,190 pounds. There was another dated February 12th from the Aaberg Fuel Company, the net of 6,690 pounds. There was another one February 13th from the Aaberg Fuel Company in the amount of 5,070 pounds. There was a second load on the 13th from the Aaberg Fuel Company with a total weight of 6,230 pounds, and there was one from [160] the City Scales dated February 18th for 4,875 pounds.

The Court: If the doctor is here, I would like to accommodate him. The witness is temporarily withdrawn from the witness stand. The doctor will come forward and be sworn.

DR. JESS W. READ

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

A. Jess W. Read.

Q. What is your business or occupation?

A. I am a physician and surgeon.

Q. Where do you practice your profession?

A. In Tacoma, Washington.

Q. Where do you live?

A. I live at Tacoma.

Q. What is the address?

A. 800 North C Street.

Q. What is your office address? [161]

A. 1125 Russ Building.

Q. Tacoma, Washington?

A. Tacoma, Washington.

Q. What is your specialty, Doctor?

A. I am a surgeon. I do quite a bit of hand work and I do some plastic work.

Q. How long have you been a practicing physician and surgeon? A. Since 1933.

Q. What school did you graduate from?

A. From Stanford.

The Court: What do you mean, you do some hand work?

(Testimony of Dr. Jess W. Read.)

The Witness: I pay special attention to lacerations and injuries of the hand, the tendon work, the nerve work, skin, things of the hand.

The Court: Was there something else you said your specialty included other than surgery and hand work? If so, will you restate it?

The Witness: No, except surgery includes some plastic work.

Q. Did you state that you specialize also in plastic work?

A. Insofar as my specialty of surgery includes that, yes. [162]

Q. How long have you been specializing in surgery? A. For the last several years.

Q. Did you have occasion to attend the medical needs of Oscar Haynes on or about the 20th day of February, 1948? A. Yes, I did.

Q. How did you happen to be called to take care of the patient?

A. I was called from the Tacoma General Hospital to see him.

Q. Were you in your office at the time you were called? A. Yes.

Q. Approximately what time were you called?

A. It was shortly after noon, shortly after 12:00 o'clock.

Q. Did you leave your office?

A. Yes, I went up to see him.

Q. Did you then see Oscar Haynes?

A. Yes.

(Testimony of Dr. Jess W. Read.)

Q. What did you find as far as his physical condition was concerned?

A. His face was covered with a plaster of baking soda. His forehead, his nose, his checks, the corners of his mouth, his chin, under his chin had been burned by some caustic. His eyes were swollen and watering. There was [163] sort of a film over the clear part of the eye. He was having considerable pain from these burns. That was the main feature for which I was called to take care of him.

Q. What did you do for his burns?

A. His burns were washed with a boric acid solution. Then they were covered with baking soda, then they were washed again with a salt solution, then the burns were covered with a vaseline gauze dressing. That was the local treatment of the burns at that time.

Q. Was he in pain at the time you first saw him?

A. Yes.

Q. You had seen him within the first hour, had you not?

A. Within the first several hours from the time he was burned, yes.

Q. Would you refer to the medical charts of the hospital, please, Exhibits 12 and 13? See if you can refresh your recollection as to what you did for Oscar?

A. According to the notes I made at the time I saw him first, I suggested we irrigate his face with a phosphate solution. That was a solution that will

(Testimony of Dr. Jess W. Read.)

neutralize either an acid or an alkaline substance, and by its volume will help wash it away and counteract it. That solution wasn't available at the time, so a salt solution was used to irrigate his face and wash off the soda bicarb solution. [164]

Then as I described, after the baking soda which was put on at first was washed off, the burns were covered with vaseline, gauze and dressings and then a piece of stockinette, like underwear material, the proper size, was put over his head as a mask, and holes cut for his nose, eyes and mouth. This was to hold his dressing in place.

Then he was given penicillin and fluids were pushed by mouth. He was given diet as he could take it, and he was given codeine or morphine as necessary for pain, and at that time I made the note that I was unable to determine the depth of the burn. One may treat a burn as a wound, and perhaps, if it is small enough, or the depth can be accurately determined, to cut out that burn and graft it immediately. In this burn we were not positive of the caustic that produced the burn and it was impossible to tell from the appearance how deep that burn was and how much tissue would have to be excised, cut out, in order to make a graft, so that that type—the other reason, the burn was quite extensive in spotted areas, and it would have been quite an undertaking to try to graft the burn primarily, so it was decided to treat it in the usual manner by protecting the burned wounds, allow the

(Testimony of Dr. Jess W. Read.)

burned tissue to soften and be discharged and then allow the tissues underneath to heal and the skin to heal over from the sides. This subsequently took place and it was never necessary to apply [165] skin to close the wounds. They healed in small areas rapidly enough so that it wasn't necessary to do a skin grafting.

Q. How long was he in the hospital?

A. Until April the 17th. He was discharged 4-18-48, 58 days in the hospital.

Q. Did you remain in attendance on him during all that period of time? A. Yes.

Q. Did you have occasion to treat his eyes also in conjunction with Dr. Cameron?

A. I saw his eyes several times with Dr. Cameron, but it was Dr. Cameron's responsibility to treat the burn of his eyes.

Q. Have you given thought to a skin graft eventually?

A. Yes, sir, I have. During the time he was in the hospital, the question had been decided whether it would be wise to skin graft those burned areas at that time or to allow them to heal and then decide if skin grafts might be necessary to replace scar tissue. I recently considered the problem and felt the appearance is the principal factor, although there are several scars at the inner corners of each eye and one at the corner of his nose, that bridges the crease at the end of the nose, and a scar at the corner of the lip that deflects the

(Testimony of Dr. Jess W. Read.)

curve of the lip slightly, and [166] a scar on the chin. If all of those various scars were piece-meal grafted, the grafts would be foreign to the texture of the skin of his face. If the whole face was grafted, it would be too major a procedure to consider for what could be gained.

Q. What would you say the recovery has been? You have examined him recently?

A. I would say that——

Q. As to his burns?

A. He has made a good recovery except for these burns. The scars, because there are several on his forehead, change his appearance. The two little scars on the inner side of each eye pull his eyelid down when he uses his eyebrows for expression. There is a scar across the crease at the side of his nose on the right that changes his appearance somewhat, and the outer tip of his lip is pulled up by another scar. Then on his chin, the skin is somewhat lumpy from scarring.

Q. Do you ascribe any reason for the face to exude at the present time, that is, erupt with various matter and so on?

A. The skin has healed a burn. The scar tissue is thin and is vulnerable to any irritation, rubbing or wind, for instance. It will very easily form tiny ulcers that will weep serum. They will heal again but that skin over a scar is not as durable as normal skin, and can very easily [167] form tiny ulcers from time to time. It is more sensitive than normal

(Testimony of Dr. Jess W. Read.)

skin. It isn't as hardy, not as protective as normal skin.

Q. Are those ulcers painful when they exude?

A. They may be if they become inflamed.

Q. Is this type of injury liable to pain in the future, that is, if there are exudations?

A. With an ulceration and inflammation in a scar, it would be temporarily painful.

Q. How long do you think these exudations might continue from your experience with burns of this nature?

A. The skin is permanently changed and at any time in the future they can form these tiny ulcerations.

Q. You treated him, you stated, during all these 58 days in the hospital. How long did the suffering and the pain continue, if you remember?

A. He still was—his misery, his pain and suffering decreased as the burns healed. At the time he left the hospital there were still some areas not completely healed and he still had some discomfort from them. His amount of pain at that time, at the end of 58 days, I don't believe would be described as suffering. He was miserable from it, though.

Q. Did you render a statement for your services?

A. I rendered a statement to the Department of Labor [168] and Industries, yes.

Q. Have you been paid? A. No.

(Testimony of Dr. Jess W. Read.)

Q. What was the value of your services? What was the statement, the amount of the statement?

A. That I don't remember exactly.

Q. We have here a statement for \$113. Is that a reasonable fee for your services?

The Court: Let it be marked.

(Bill marked Plaintiff's Exhibit 20 for identification.)

The Witness: Yes, that is on the basis of the Department of Labor and Industries fee schedule, and that would be reasonable for 58 days' care in the hospital.

The Court: What amount would you say would be a reasonable charge for your services at that time?

The Witness: \$113.

(Hospital statement marked Plaintiff's Exhibit 21 for identification.)

Mr. Ben Maslan: I think counsel agrees that is a reasonable statement from the hospital and may be [169] admitted, that is my understanding.

Mr. Preston: That is correct.

The Court: Do you offer Plaintiff's Exhibit 20?

Mr. A. L. Maslan: Yes, Your Honor. That is the hospital bill.

The Court: Ask the witness what it is.

Q. What is that, Doctor? A. \$580.

The Court: What does it concern, or state?

(Testimony of Dr. Jess W. Read.)

The Witness: It is a statement from the Tacoma General Hospital for Mr. Oscar Haynes.

The Court: The Tacoma Hospital bill, is that what it is?

The Witness: Yes, sir.

Q. For what period of time is that?

A. February 21st through April 18th, 1948.

Q. How much does that show?

A. \$580.42.

Q. Would you say that is a reasonable bill for the amount of services that have been rendered?

A. Yes.

The Court: Do you offer Plaintiff's Exhibit 21?

Mr. A. L. Maslan: Yes, Your Honor.

The Court: It is admitted. [170]

(Plaintiff's Exhibit 21 received in evidence.)

Mr. A. L. Maslan: You may take the witness, counsel.

Mr. Preston: I have no questions.

Mr. A. L. Maslan: Pardon me, one question.

Q. After examining Oscar, could you prognosticate as to how his face would look a year or two from now, or would you say his face will appear the same?

The Court: Has the plaintiff been presented to you for such an examination lately? If not, he may be presented now. Just look at him, have the question read and answer the question. Read the question.

(Testimony of Dr. Jess W. Read.)

(Last question read by reporter.)

The Witness: I would say the face would appear practically the same as it does now in a year or two. The color of the areas on his forehead will probably fade, but they will become whiter and it will be just as noticeable.

Q. Do you then consider these facial injuries as permanent? A. Yes.

Mr. A. L. Maslan: Take the witness.

Mr. Preston: No questions.

The Court: The doctor may be permanently excused. [171]

(Witness excused.)

The Court: Remember the Court's previous admonitions against discussing this case with anyone, and concerning the conditions under which you may receive information, and do not receive information in any other way. Be sure to remember and heed the Court's admonitions. I think we should be able to begin by 9:30 tomorrow morning and the jurors are excused until that time and may now retire. Counsel and I have some work to do this evening.

Court will be at recess until 8:30 this evening.

(At 7:00 o'clock p.m., Tuesday, November 22, 1949, proceedings recessed until 8:30 o'clock p.m., Tuesday, November 22, 1949.)

Seattle, Washington, November 22, 1949,
8:30 o'Clock, P.M.

(Argument had by respective counsel on behalf of plaintiff and defendant.) [172]

The Court: So far as any evidence up to this time is concerned, there is nothing that justifies the Court in submitting this issue to the jury. The undisputed fact so far is that this accident took place on premises wholly disconnected from the plant and industrial operations of the defendant. Any extra hazardous work which the defendant may have been doing in connection with the defendant's industry had ceased long before this accident happened with respect to the cause of this accident. This pipe which exploded or which produced an explosion when the walls of the pipe were broken by the sledge hammer was wholly disconnected from any present or then existing activities in the defendant's industrial operation. This pipe which produced an explosion when the walls of the pipe were broken had become wholly disconnected from service so far as the operations of the defendant's plant and facilities in the defendant's extra hazardous business were concerned.

Such disconnection from service was just as effective as if the power transmission cable or the electric wire in the Weifenbach case had been severed by pliers two miles from the place where the plaintiff in the Weifenbach case was injured, and had been discarded and entirely thrown away, and after

it had [173] been so discarded the plaintiff had stumbled upon it and thereby had sustained an injury. In such a situation, the wire could not have been reasonably held to have been connected with the City of Seattle's electric distribution system, and in that situation the wire would not have been in service, and as to it the City of Seattle would not have been engaged in extra hazardous employment or operation. And so here, this pipe for an appreciable time before this accident was disconnected from any extra hazardous operations of the defendant in its industry and had been separated from its plant and delivered to the plant of a total stranger so far as the defendant's industry and extra hazardous operations in industry were concerned. And just as in the Gephart case, the defendant was not in the course of any extra hazardous employment at the time of the accident so far as the instrument or thing which caused the accident was concerned.

The plaintiff, therefore, has the right to, as he alleges he has elected to do, seek his remedy by suit against the defendant rather than to take the benefits provided by the Workmen's Compensation Act of the State of Washington, and any defense pleaded by the defendant by which the defendant claims an exemption under the proviso, "that no action may be [174] brought against any employer or any workman under this Act as a third person if at the time of the accident such employer or such workman was in the course of any extra hazardous employment under this Act . . ." does not apply

to the facts so far developed in this case, and does not establish any right in the defendant to plead the defendant's first affirmative cause of action. The proof so far establishes positively the lack of defendant's qualification to assert the defense under this proviso which I have just read.

Has anyone anything further to say with respect to any other practical aspects of pleading or of proof, if any proof is available.

Mr. Starin: In the light of the Court's ruling, we intend to make an offer of proof of the facts which we have alleged for the purpose of the record. We presume that there will be some time available tomorrow for that purpose.

The Court: Do you have the offer of proof?

Mr. Starin: We do not have it in such form at this moment, Your Honor, as we would like to have it.

The Court: The other detail that I had in mind in asking you if there was anything further to be said was this: This ruling does not preclude the right of defendant to offer evidence, if the defendant has any, [175] that this accident took place on the defendant's premises, or any other evidence that would tend to prove that this pipe was not severed from the service of defendant's extra hazardous operations, if there is any such proof of that kind or evidence of that kind available at this time. I take it from the developments so far that it is not likely that there is available to defendant any such evidence as that kind I now mention.

Of course, this Court does not know what the evidence is or is likely to be. Up to now I do not see any promise of any such, but I am speaking with reference to the situation as it now is on the proof which has now come in, and I am certain that up to now you are not entitled to have this issue submitted to the jury on any evidence that has been received up to this time. Unless there is brought out before the jury some evidence which will justify the submission of this issue to the jury, at a proper time the Court would be disposed to rule upon a motion similar to that which is here now before the Court, that the motion should be granted, which would leave the Court after such granting without that issue before the Court and jury and would relieve the Court of any necessity of instructing the jury concerning any such issue as that tendered by the [176] defendant's first affirmative defense.

I indulge that further thinking so as to project ourselves into the future. It seems to me at the present it is not necessary for the Court to rule upon this motion because the case is not finished yet, and as long as the case is not finished, I have no right to say now that there not only is not or will not be any evidence which will entitle the defendant to submit that issue to the jury.

Mr. Preston: Our offer of proof will go, I might say, to these points which we concede are essential and proper, but under Your Honor's ruling I presume the offer would be denied; namely, that the

defendant was at all times concerned since the inception of its plant, the opening of its plant, a contributor to the fund for extra hazardous employment, was not in default thereunder; and secondly, that all employees in the plant of the defendant were at all times since the opening of the plant in 1928 engaged in extra hazardous employment and so classified under the act and premiums paid accordingly. That, I assume, possibly the other counsel will stipulate to be the fact, although we will make an offer of proof. Under Your Honor's present indicated ruling, that would be probably ruled as incompetent. [177]

We are not attempting to show that the injury to the plaintiff happened any other place than has been disclosed in the evidence, nor will we contend that the pipe in question was not in the Frank Powser yard at that time.

The Court: I assume you will not contend that the pipe in question had for an appreciable length of time been disconnected from service in the defendant's extra hazardous industrial operations?

Mr. Preston: The evidence shows and we will concede it to be the fact it was part of the system until it was sold on this day.

The Court: Until it was disconnected and put in the salvage?

Mr. Preston: No, on that, Your Honor, the evidence shows that even after it was disconnected and taken out of the system proper that it was

kept there as a spare until it was decided to be sold on this day.

The Court: But it had not been in use since it was disconnected? It had not been in actual use?

Mr. Preston: Not in physical use, it was standing by as a spare and was part of our system in that respect. That is what the evidence shows up to now and we will not contend otherwise.

In addition to that, Your Honor, our [178] offer will show when it is made that the plaintiff was at all times during the happenings here concerned a workman under the act and classified under the extra hazardous employment. In fact, we will also show that as bearing on that—we would offer to show that he applied for and received compensation under the act as an extra hazardous employee.

The Court: By virtue of the accident?

Mr. Preston: Yes.

Mr. Ben Maslan: He elected to.

The Court: What evidence is there in the record of the last fact stated by Mr. Ben Maslan?

Mr. Ben Maslan: If there is any question about it, we will present affirmative evidence on this, Your Honor.

The Court: I have noted that that has been stated more than once this evening, and I do not recall having brought to my attention during the trial, any evidence of that election, and I believe that there is something in the law touching the necessity of such.

Mr. Ben Maslan: It may very well be that the

mere bringing of suit is election, Your Honor. At the time of counsel's offer, we will present this other matter.

The Court: Is there anything else? [179]

Mr. Starin: At the conclusion of the testimony of Mr. Driskell, the question was asked as to whether or not a similar accident had occurred previously, and the Court reserved ruling.

The Court: The Court sustained the defendant's objection to that inquiry, and I made a statement that unless counsel convinced me this evening that I was wrong, the ruling would stand.

Mr. Ben Maslan: We have discussed it and we are satisfied that we should not press the issue at this time.

The Court: I will excuse counsel until 10:00 o'clock. Court is adjourned until tomorrow morning at 9:30.

(At 10:30 o'clock p.m., Tuesday, November 22, 1949, proceedings recessed until Wednesday, November 23, 1949, at 9:30 o'clock a.m.) [180]

Seattle, Washington, November 23, 1949

10:00 o'Clock, A.M.

The Court: Let the record show that all jurors are present and also all parties on trial with their counsel.

I might explain to the jurors that the proceedings in Court last night were longer than we an-

ticipated and the Court expressly excused counsel and parties until this hour.

Mr. Driskell will resume the stand for further examination.

J. M. DRISKELL

Direct Examination

(Continued)

By Mr. A. L. Maslan:

Q. Will the reporter please read the last question and answer?

(Last question read by reporter as follows:

“Q. Would you make known to the jury the dates on these, please?

A. I will, I am just getting around to the description of it. [181]

Q. Go ahead.

A. A weight slip from the Aaberg Fuel Company, dated February 12th, 5,190 pounds. There was another dated February 12th from the Aaberg Fuel Company, the net of 6,690 pounds. There was another one February 13th from the Aaberg Fuel Company in the amount of 5,070 pounds. There was a second load on the 13th from the Aaberg Fuel Company with a total weight of 6,230 pounds, and there was one from the City Scales dated February 18th for 4,875 pounds.”)

The Court: With regard to coming in or going out of your industrial plant premises, in what manner were these transactions handled? In what clas-

(Testimony of J. M. Driskell.)

sification were they? Were those transactions concerning materials coming in or going out of your plant facilities?

The Witness: Material going out.

Q. Mr. Driskell, under whose supervision were these loads of scrap iron weighed?

A. I don't quite get what you mean on that.

Q. Where were they weighed, do you know?

A. These various places that I read, Aaberg Fuel Company and City Scales.

Q. Those are public scales, are they?

A. I believe they are.

Q. They are outside of the plant, [182] are they?

A. Yes, sir.

The Court: Whose plant?

Q. Outside of the plant of the Pennsylvania Salt Manufacturing Company?

A. That's right.

Q. Did you point out the scrap and did Mr. Powser then take them and weigh them outside the plant, is that the procedure?

A. I wouldn't know about that, because I don't dispose of it.

Q. I beg your pardon?

A. I wouldn't know about that because I do not dispose of the scrap.

Q. Who delivered those weight slips to you?

A. Actually, they didn't come to me. They came to some of my employees and they probably came through from Mr. Nelson.

(Testimony of J. M. Driskell.)

Q. They came from Mr. Nelson?

A. I believe so.

Q. How did you come to the invoice dated February 24th, that is, how did you come to make that invoice dated February 24th?

A. That would be the date when the slips would all be in, and they would be sure there would be no further slips coming in, so one billing would cover the whole [183] transaction.

Q. Then the bill of February 24th would cover the transaction of all the scrap iron which had been delivered to Mr. Powser, the dates of February 11, 12, 13 and so forth?

A. From the 12th to the 18th.

Mr. A. L. Maslan: That is all.

The Court: You may cross-examine.

Mr. Preston: No questions.

The Court: You may be excused.

(Witness excused.)

PAUL E. NELSON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. Your name is Paul E. Nelson?

A. Yes, sir.

Q. Where do you live?

(Testimony of Paul E. Nelson.)

A. 225 South 60th, Tacoma, Washington.

Q. Where are you employed?

A. Pennsylvania Salt Manufacturing Company.

Q. What is your position there?

A. Store keeper.

Q. How long have you been employed as such store keeper at that plant?

A. For about two and a half years.

Q. Were you employed as such store keeper during the month of February, 1948, at the Pennsylvania Salt Manufacturing Company plant in Tacoma? A. Yes, sir.

Q. What does that position of yours entail, that is, what are your duties as such store keeper?

A. Well, I wouldn't know how to explain that, charge of the storeroom and supplies.

The Court: What kind of work did you do in February, 1948? Describe some of the duties performed by you in that capacity.

The Witness: Inventorying the supplies on hand.

Q. In relation to your duties, do you have charge of the disposal of the scrap iron materials and used pipe belonging to the plant? A. Yes, sir.

Q. During the month of February did you have charge of such disposal? A. Yes, sir.

Q. That is, February, 1948. Does that also include [185] used pipe and discarded pipe?

A. Yes, sir.

Q. Do you recall having any transactions in re-

(Testimony of Paul E. Nelson.)

lation to the sale of used scrap and discarded pipe to Mr. Frank Powser? A. Yes, sir.

Q. What particular duty did you have in relation to such disposal or sale?

A. I would call Mr. Frank Powser and tell him that we had some scrap for sale and he would send his truck down.

Q. Did he do this? A. Yes, sir.

Q. Did you have anything to do with the allocating or pointing out of the particular scrap iron and pipe to Mr. Powser or his assistants?

A. Yes, sir.

Q. Will you state the circumstances in relation thereto, please?

A. Well, we have a certain spot for scrap iron, pipe, and there is other places in the yard that would be surplus or discarded material.

Q. What happens to the scrap iron or discarded pipe? Do you place it in one or two different spots or locales in your yard? [186]

A. Well, small stuff would be placed in a certain spot and larger discarded material would be placed in another location.

Q. Would you please look at Exhibits 1, 2, 3 and 4 and 7, 8, 9 and 10 of the plaintiff and state to the jury what those exhibits portray?

A. That is a pipe coil that was in our yard.

Q. Do you recall whether you sold that in addition to other scrap to Frank Powser?

A. Well, it looks familiar but I couldn't be

(Testimony of Paul E. Nelson.)

certain if it was or not because at that time I wasn't familiar——

Q. What was customarily done in the sale of scrap iron and scrap pipe?

A. Well, when Mr. Powser would bring in the weight certificate or weight slip, then I would make out the shipping memorandum and turn it over to the main office.

Q. What did you do before you got the weight slip? There were some proceedings before you got the weight slip, were there not?

A. I couldn't do anything until I got the weight slip.

Q. How did you happen to get them? What did Mr. Powser have to do before he could get the weight slips?

A. He would have to take it down to those certified scales to be weighed. [187]

Q. Those are all certified scales? A. Yes.

Q. That would be subsequent to the time that he picked up this scrap, and he picked up the scrap subject to your direction, isn't that so?

A. That's right.

Q. Do you know where that particular type of pipe came from?

A. No, I don't. That was before I went to work there.

Q. Did you ever see that pipe in place in your plant? A. No, I haven't.

Q. When was the first time you saw that pipe?

(Testimony of Paul E. Nelson.)

A. When I saw these pictures.

Q. Is that the first time you remember seeing the pipe?

The Court: I understood from your previous statements that you were doing this kind of work for your employer during the month of February, 1948, and do you now say you were not doing this kind of work at that time?

The Witness: Yes, I was but the pipe—I can't recollect seeing that pipe at the time of disposal.

Q. Do you not state you saw that pipe in the scrap [188] pile?

A. It looks familiar, yes.

Q. If you were advised by the evidence and by Mr. Powser that that pipe was taken from your yard pursuant to your direction, would you state that is true or untrue?

A. I would say it was true.

Mr. Preston: That is not a proper question, if the Court please.

The Court: The objection is sustained. The answer is stricken and the jury will disregard it.

Q. Did you ever see any pipe similar to that in the scrap pile? A. No, I haven't.

Q. Did you have occasion to dispose of pipe of any kind in the scrap pile? A. Well, yes.

Mr. A. L. Maslan: That is all.

The Court: You may cross-examine.

(Testimony of Paul E. Nelson.)

Cross-Examination

By Mr. Preston:

Q. Did you or someone else determine what was to be sold and what was to be retained out of those materials that were not being actually used in the operation of this plant?

A. On this particular subject it was another person. [189]

Q. Who would that be?

A. Mr. Cliffe.

Q. Then I take it that this particular pipe was sold under the direction of Mr. Cliffe rather than yourself?

A. That is right.

Q. You simply were an instrumentality in calling Mr. Powser, whoever you wanted to sell it to, to come over and see it?

A. Yes, sir.

Q. To see what Mr. Cliffe had decided they no longer needed, is that right?

A. Yes, sir.

Q. Is it or is it not true that materials were kept during the war years and afterwards in the yard adjoining the plant of the defendant for possible replacement use?

A. Yes, sir.

Q. If you remember, will you tell the jury whether or not coils similar to the one that is pictured which you have before you were so kept in the yard adjoining the plant of the defendant, if you remember?

A. Well, I don't know of any coil similar to this one being in the yard.

Q. At any place?

A. No.

(Testimony of Paul E. Nelson.)

Q. When did you come to work for the company? [190] A. March 4, 1947.

Q. Where is your office and where do you work from with respect to this particular plant?

A. I work in the storeroom and shop combined.

Q. Is that part in the building of the plant as distinguished from a separate building which houses the office force?

A. Yes, it is inside the plant.

Q. You are actually inside the plant and your duties keep you inside the plant, is that correct?

A. Yes.

Q. And this other building, this office building that I am speaking of, contains the office and stenographic help, is that right?

A. That is right.

Q. A separate building?

A. That is right.

Mr. Preston: That is all.

Mr. A. L. Maslan: That is all.

The Court: You may step down.

(Witness excused.) [191]

FRANCIS P. OWENS

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. What is your name, please?

(Testimony of Francis P. Owens.)

A. Francis P. Owens.

Q. Where do you live?

A. In Seattle, Washington.

Q. What is the street address, please?

A. 2729-38th S. W.

Q. What is your occupation?

A. I am a chemist.

Q. What type of chemist?

A. Analytical and consulting chemist.

Q. What?

A. Analytical and consulting chemist.

Q. Where are you employed?

A. I am employed by Laucks Laboratories, Inc.

Q. How long have you been employed there?

A. I have been employed by Laucks since May of 1934.

Q. In what capacity? [192]

A. In varying capacities from sampler to chemist to chief chemist.

Q. Where are you graduated from?

A. I was graduated from the State College of Washington with a degree of Bachelor of Science in chemistry in June of 1933.

Q. And you have furthered your studies since that time?

A. I took some graduate work at the University of Washington in 1940.

Q. Just what does your work entail?

A. Our work entails examining and testing the various commodities and products that are submitted to us by clients who have analytical work to

(Testimony of Francis P. Owens.)

do and do not have the facilities themselves to do it.

Q. Do you recall analyzing a chemical for me some time in August, 1948? A. Yes, sir.

Q. What was it that you analyzed?

A. You submitted several samples to our laboratory, among them being a pint milk bottle containing some liquid, and also some sediment, and several items of clothing including a hat and pants.

Q. Do you have that clothing with you?

A. Yes, sir. [193]

Q. By the way, where did you get that clothing?

A. It was submitted to me personally by you.

Q. Was there anyone else with me at that time?

A. There were two other gentlemen with you, there was a Mr. Albert Hanan and another gentleman, I forget his name at the moment.

Q. Was the man George Haynes?

A. Yes, sir, that was the name.

Q. Do you have that clothing with you that was submitted to you? A. Yes, sir.

Q. Would you produce that, please?

(Clothing marked Plaintiff's Exhibit 22 for identification.)

Mr. A. L. Maslan: That will be connected up later as being the clothing, if there is any question, Your Honor.

Q. Is that clothing safe to handle at the present time?

(Testimony of Francis P. Owens.)

A. Well, there are still some corrosive materials on it. It would be best not to get it on your hands.

The Court: Let counsel on each side see Plaintiff's Exhibit 22 for identification.

Mr. Preston: I can't see anything. It is all covered with paper.

Q. Would you take that out, please? Mr. Owens, did you have occasion to test the contents of the bottle? A. Yes, sir.

Q. What did you find the contents of the bottle to be?

The Court: Is the bottle mentioned by you present among those articles marked as Plaintiff's Exhibit 22?

Mr. A. L. Maslan: Yes, Your Honor.

The Court: I asked the witness.

The Witness: Yes.

Q. Did you have occasion to analyze the contents of that bottle? A. Yes, sir.

Q. What did you find the contents of that bottle to be?

A. I find that it contained approximately 48 per cent by volume of sulphuric acid, and it had a residue in it which consisted essentially of iron sulphate.

Q. Is iron sulphate a salt? A. Yes, sir.

Q. Did you in addition have occasion to analyze any of the chemicals or salts that were taken, if they were, from the clothing that was submitted to you? A. Yes, sir. [195]

(Testimony of Francis P. Owens.)

Q. What did you find to be the chemical composition of that material or salt?

A. Portions of clothing that were disintegrated, as evidenced by looking at them, were removed and put in water and boiled to dissolve any residue that might be in them, and then this water was filtered from the clothing and was tested to determine whether or not there was sulphate present in it, and also to determine the reaction or acidity of the water to give me an idea whether or not the nature of the sulphates could have been of an acid character.

Q. What did you find to be the chemical composition?

A. I found that all of the samples that were tested did contain sulphates and that the reaction was on the acid side by an appreciable amount.

Q. How much would you say they were on the acid side?

A. Well, a quantitative measurement was not made of this, but the water was tested qualitatively with litmus to determine its Ph—and by Ph I mean the acidity of the water. A neutral solution is said to have a Ph of 7, while if it is acid, it drops down to zero, from 7 to zero; and if it is alkaline, the Ph number is from 7 to 14. The water that portions of this clothing were boiled in had a Ph of approximately 2, it could have been less, which would indicate it was high on the acid side. [196]

Q. What acid was it? When you say “on the

(Testimony of Francis P. Owens.)

acid side" what acid do you have reference to?

A. Sulphuric acid. Qualitative tests were also made for other acids such as chlorides and phosphates and none of those were detected, and the main was sulphate, so it was our opinion it was sulphuric acid.

Q. Would a chemical which contains a Ph of 2 indicate a weak or a strong acid solution?

A. It would be on the strongly acid side.

Q. Would that strength of an acid be highly corrosive? A. Yes, sir.

Q. Would you consider it dangerous to human life?

A. Well, I would consider it corrosive to the extent that it could cause burns, could cause flesh burns.

Q. Indicating the clothing which you have examined, does that show acid burns, that is, the clothing?

A. Well, the condition of the clothing is typical of what would happen if you put acid on clothing of that sort.

Q. Did you have occasion in September, 1948, to examine certain pipe in Tacoma, Washington?

A. Yes, sir.

Q. Was that at my request? A. It was.

Q. Do you recall the date?

A. It was September 10th. [197]

Q. What year was that? A. 1948.

Q. Where did you go?

(Testimony of Francis P. Owens.)

A. I went to a junk yard in Tacoma, in the tide flats of Tacoma.

Q. I beg your pardon?

A. It was located in the tide flat area of Tacoma.

Q. Was that the junk yard of Frank Powser & Company? A. Yes, sir.

Q. You say you went there September 10th?

A. Yes, sir.

The Court: What year?

The Witness: 1948.

Q. What was the purpose of that trip?

A. Well, the request made of me was to go to Tacoma and withdraw a sample of liquid from the coils in question, if I could obtain such a sample, and to test the liquid and determine what it was.

Q. Would you look at Exhibits 7, 8, 9 and 10 and also 1, 2, 3 and 4? I believe 7, 8, 9 and 10 are more clear. Would you testify from them, please? Would you orient yourself with those exhibits? Did you say that the purpose of your trip was to withdraw a sample of the liquid? A. Yes, sir.

Q. Would you tell the jury what you found? Would you [198] please describe that coil of pipe first and then tell the jury what you found?

A. Well, the coil as I found it consisted of two tiers of coils, and there were four pipes in each tier, and I paced the length of the coil off. It was approximately 21 feet long, and in trying to find—I could not find a portion in the pipe from which I could withdraw any liquid which might be present

(Testimony of Francis P. Owens.)

in it, and the coil as I observed it was a condenser type of coil. By that I mean it was one pipe within another pipe.

The inner pipe went the length of the pipe, and then welded onto the outside of it was another pipe which was closed and separate from the inner pipe, and I assumed that the inner pipe was a condenser type of coil. In other words, the liquid could be passed through it to warm what was in the outer coil, or it could have been vice versa. It could have been that the outer one was to cool what went through the inner one, but I couldn't find a place in the coil from which I could withdraw a sample. There was on the outer coil a T shaped coil which was welded to this outer coil, and around the base of this T coil that went onto the outer coil there were several areas that were badly corroded and which appeared to possibly have been corroded clear through and plugged at the time of the inspection by salts which did not permit liquid to come out of it, and of [199] course the coil was so heavy I couldn't move it.

It wasn't on a perfect level, it slanted to one end, but I did not make any attempt to move the coil because of its weight, and I did not make any attempt to try to get a sample from inside of it. However, I did take samples of salt around this corroded area at the base of the T.

Q. Why did you not obtain any liquid from the pipe itself? A. Well, one reason was that—

(Testimony of Francis P. Owens.)

The Court: Is there anything different from what you have already said? I understood you had already explained that.

The Witness: One reason was it was too heavy, and the other, I didn't care to take any chance of seeing the corroded condition around the T break into the coil itself, which it might be under pressure, and if there were liquid in it, it possibly could spray out.

Q. Did you make the analysis of any salt that you scraped from the pipe, from that T section?

A. Yes, sir.

Q. What did you find the analysis to show?

A. It was primarily iron sulphate and it had a rather low Ph, as did the other samples. Its Ph was approximately 2 or less. [200]

The Court: What did you say the component elements in the salts were?

The Witness: Iron and sulphate, iron sulphate salt.

Q. Did you come to a conclusion as to what that Ph was?

A. Well, the opinion I had was that there was probably a little residual sulphuric acid in the salts, and that accounted for the Ph going so low.

Q. By being low, you mean a strong acid solution?

A. On the acid side, yes, sir.

Q. You stated that there was a salt you found chemically known as iron sulphate. How would that iron sulphate be formed?

(Testimony of Francis P. Owens.)

A. It could be formed by the reaction of iron with sulphuric acid.

Q. What would cause a liquid solution to spew forth from pipe at a great pressure? Would you state the chemical reactions that were involved?

A. When sulphuric acid reacts with iron, the gas hydrogen is evolved, and as the reaction continues, then the quantity of hydrogen that is produced increases. It creates a pressure within a closed system and if the pressure in that system is suddenly released, and there is liquid in the chamber in which the pressure is, it has a tendency to [201] carry the liquid out with the gas as it escapes.

Q. Assuming that this pipe were to receive a sharp blow and the sulphuric acid or sulphate salt would spew forth, what would be the reason chemically for it coming out in a gush, or with pressure?

A. Well, it is as I just explained. It is the natural tendency for the gas when it is evolved suddenly to carry with it a solution which surrounds it when that release is made.

Q. From your investigations and your chemical analyses subsequent, could you say that there was sulphuric acid in that pipe?

A. On the basis of our tests and investigations, it is my opinion that it did have sulphuric acid in it.

Q. What are the qualities of sulphuric acid?

A. It is of a corrosive nature. It has a tendency to cause burns. It has shipping regulations when it

(Testimony of Francis P. Owens.)

is shipped by railroads and so on. It has to contain what is called a white label which in turn signifies that it is corrosive, and when shipped to laboratories such as ours, it is shipped in containers which are labeled telling us to exercise caution in handling it because——

Mr. Preston: That is not responsive, if the Court please, and I move the answer be stricken and the jury instructed to disregard it. [202]

Mr. A. L. Maslan: I believe the answer is proper. I asked him what the qualities of sulphuric acid were.

The Court: He spoke about the precautions. The question did not call for the precautions in shipment. The stated precautions in shipment portion of his answer is stricken and the jury will disregard it. That part of the answer which is responsive to the question will stand.

Q. What precautions are taken to safeguard one handling sulphuric acid in shipment and in the ordinary handling of sulphuric acid in commerce?

Mr. Preston: That is not within the issues, if the Court please. We are not dealing with shipment here. We are getting off at a tangent.

The Court: I think that should be sustained. It is so ordered. Ask another question.

Q. Would you state that if sulphuric acid were not properly handled that it could be dangerous to human life and limb?

(Testimony of Francis P. Owens.)

Mr. Preston: That is repetitious and calls for a conclusion.

The Court: He has already spoken of its corrosive qualities. The objection is sustained. He spoke of the corrosive qualities of the [203] materials that he examined. Is this question directed to any such substance, whether that particular substance is involved in this accident or not? I am not ruling upon your right to do that, I am ruling upon the matter of further inquiry as to the corrosive qualities of the substance actually found here.

Q. You stated that you found a certain concentration of this sulphuric acid. You stated that it had a Ph of 2 and further you stated that there was 48 per cent, I believe, is that the percentage?

A. 48 per cent by volume, yes.

Q. 48 per cent by volume of the acid, is that true?

A. Yes, sir.

Q. Would you state that sulphuric acid of such a concentration was corrosive to human limb?

Mr. Preston: Objected to as repetitious, if the Court please?

The Court: I am going to overrule this objection and ask counsel to be content with this inquiry on this specific subject.

The Witness: I would say it was definitely corrosive.

Mr. A. L. Maslan: Take the witness. [204]

(Testimony of Francis P. Owens.)

Cross-Examination

By Mr. Preston:

Q. Whereabouts on the pipe did you notice the corrosion?

A. I noticed an appreciable amount of the corrosion around the base of the T which was welded onto the coil.

Q. Was that where there was an opening in the pipe? A. No, sir.

Q. Did you see any opening from which any of this material came forth?

A. I didn't see any opening in the outer coil at all.

Q. In other words, you didn't get any liquid from inside of the pipe at all, did you?

A. No, sir.

Q. Your examination was confined to some—I believe you described as acid or salt or something of that kind on the outside?

A. Some residue which was taken from the corroded area around the base of the T.

Q. Am I correct in my description of what you found as salt or acid?

A. It was a liquid residue, a moist residue.

Q. Was there any corrosion any other place on the pipe?

A. I didn't notice any appreciable amount of corrosion [205] any place else.

Q. Have you any way of determining or esti-

(Testimony of Francis P. Owens.)

mating from your examination and your subsequent tests of this outside material as to how long that corrosion had been on the outside of the pipe?

A. No, sir.

Q. What is your best judgment as to that?

A. I wouldn't hazard a guess, because I don't know.

Q. Did it look like it had been recently corroded or had been corroded for a matter of years?

A. Well, I couldn't tell because iron corrodes at different rates and the metal is pitted quite severely around that area, but there are so many varying conditions that can inhibit or accelerate that rate of corrosion, I wouldn't know.

Q. Was the corrosion in the same area as the substance in which you made your tests?

A. Yes, sir.

Q. In other words, when this material appeared on the outside of the pipe it apparently started corroding because the areas were identical, as I take it? Do you understand what I mean?

A. No, I don't know what you mean by identical.

Q. I thought you said the areas of corrosion was the same as the area of this deposit that you examined? [206]

A. That is right, it was around the perimeter of the T pipe was corroded, and it was from that area that I took my salts.

Q. You say that spewing forth—you used that

(Testimony of Francis P. Owens.)

term—of this material would indicate that it was under pressure? A. I did, yes.

Q. Would such pressure be formed unless that pipe was tightly closed? A. No, sir.

Q. It would have to be tightly closed?

A. Yes, sir.

Q. How long in your judgment could that pressure be built up inside of a coil such as you saw, materials, liquids such as you determined were in the pipe?

A. I have no way of knowing. That would depend upon the gauge of the pipe itself and any corroded areas in it. If there were no corroded areas, it could probably withstand a very great pressure. If there were corroded areas in it, and iron had become thin in those areas, the pressure it could stand would be appreciably diminished, so I really don't know.

Q. As I understand, was this substance which you determined was in this pipe—was that corrosive to metal?

A. Well, with the Ph that it had, it could be corrosive to metal but basically it [207] appeared to be the residue from corrosion of the metal.

Q. Is there any way that you could determine whether, for instance, that pipe could have had acid in it for a period, say, eight years after it had been taken from the plant?

A. No, there is no way I could tell that.

Q. From your experience, would you say that if

(Testimony of Francis P. Owens.)

a pipe of that kind were closed for eight years, that the pressure that would have built up would have been indicated before eight years later?

A. I have had no direct experience to tell that, but I do know that acid in such a pipe could be there for a long period of time without any appreciable corrosion whatsoever.

Q. How about the pressure?

A. That would follow also, it is possible. It could be in there for a long period of time without any pressure being created, because the acid under some conditions can make the iron or steel paved. In other words, it forms a film of hydrogen over it and the acid cannot penetrate that film of hydrogen and cause corrosion.

Q. Do you know of any such cases of your own knowledge?

A. Only those about which I have read. I have never seen any. [208]

Q. You have never seen it happen yourself?

A. No, sir.

Q. I noticed at the start of your testimony you said something about being dangerous to touch this clothing here in the exhibit, but perhaps I misunderstood you, because I noticed you handling it quite freely, brushing your hands off. Did I misunderstand your testimony?

A. No, sir, you didn't.

Q. Have you suffered any injury from doing that?

A. No, sir.

Mr. Preston: That is all.

(Testimony of Francis P. Owens.)

Mr. A. L. Maslan: That is all. I will want to offer these in evidence. Is there an objection?

Mr. Preston: You said you would connect them up.

Mr. A. L. Maslan: I will connect them up.

The Court: This witness should remain in attendance until later excused.

Those connected with this case will be excused for at least ten minutes.

(Recess.)

Mr. Ben Maslan: There are one or two questions. I want to submit to the Court in the absence of the jury, whether or not we have to produce evidence as to the mortality or life expectancy tables, or whether Your Honor under the rulings of the State of Washington [209] Supreme Court takes judicial notice.

The Court: No, I will not take judicial notice.

Mr. Ben Maslan: All right, we have such testimony.

There is another question. The question was raised about 10:30 last night relative to the election made by the plaintiff in this case. Your Honor will recall the statute which reads: "Workman means every person in this state, who is engaged in the employment of any employer coming under this Act whether by way of manual labor or otherwise in the course of his employment: Provided, however, that if the injury to a workman is due to the negligence or wrong of another not in the same

employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this Act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this Act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; and if the other choice is made, the accident fund shall contribute only the deficiency, . . .”.

We have here all the files, and Mr. A. L. Maslan can testify, Mr. Haynes can testify, we have someone [210] here from the Washington State Department involved with their records, all showing that an election had been made. The question is whether we can present it here in the absence of the jury so that Your Honor can take cognizance of that.

The Court: Is there any objection to presenting it in the absence of the jury, or do you insist that it be presented in the presence of the jury?

Mr. Preston: I think it is proper for all testimony except that which is offered only by way of an offer of proof, to be in the presence of the jury.

The Court: You may present it in the presence of the jury. You should have the opportunity of putting in definite testimony bearing upon such election, but I do not think it is incumbent upon you to put in all of the possible testimony that you could find upon that question, if there is more than is needed.

Bring in the jury.

All of the jurors have returned to their places as before, and likewise all parties on trial with their counsel. You may proceed.

Mr. Preston: I would like to recall Mr. Owens for another question.

The Court: Mr. Owens will resume the stand for further examination. [211]

FRANCIS P. OWENS

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows:

Cross-Examination

(Continued)

By Mr. Preston:

Q. I understood you to say that the test you made indicated that this sample of sulphuric acid that you took was 48 per cent by volume?

A. Yes, sir.

Q. Assuming that in the use of this sulphuric acid in the plant of the defendant Pennsylvania Salt Manufacturing Company was—that the sulphuric acid there used was 80 per cent in volume, that would indicate to you that there had been a dilution of this somewhere along the line?

A. Yes, sir, it would indicate a dilution or loss of water.

Q. Would that be a loss by water, by the addition of water?

A. Well, it would either be a dilution with water

(Testimony of Francis P. Owens.)

or a loss by evaporation of water that was originally in the mixture.

Q. Would flushing of such a pipe with water tend to [212] dilute the volume of what sulphuric acid there was in the pipe? A. Yes, sir.

Q. That could account for the diminution in volume of this particular sample that you found, is that right? A. It could, yes, sir.

Mr. Preston: That is all.

Redirect Examination

By Mr. A. L. Maslan:

Q. But counsel just asked you whether flushing could dilute the pipe, that is, could dilute the concentration of the sulphuric acid, is that not so?

A. Yes, sir.

Q. And that is the reason why the sulphuric acid was reduced from the concentrated strength of 80 per cent to 48 per cent, is that right, if it were flushed? A. It could, yes, sir.

Q. However, if it were thoroughly flushed, all of the sulphuric acid should have been out, should it not?

A. It could have been, if it were thoroughly flushed.

Q. Also, could not the sulphuric acid have become diluted by atmospheric conditions, and sun rays and rain also?

A. It could have been so diluted. [213]

(Testimony of Francis P. Owens.)

Q. Would not the fact that a salt was present show that there was evaporation also?

A. Usually in the reaction of your acid with the iron the hydrogen is evolved, and it is from the acid itself, and it doesn't necessarily affect the water, the volume of original water that was concerned.

The Court: Read the question.

(Last question read by reporter.)

The Court: I ask the witness to think of that question, not some other one, and answer it directly.

The Witness: It would not.

Q. What would the salt show?

A. The salt would show that there had been a reaction between the acid and the iron.

Q. And the fact that you found sulphuric acid there would show you that there had not been a complete flushing, would it not? A. Yes, sir.

Mr. A. L. Maslan: That is all.

Recross-Examination

By Mr. Preston:

Q. Do you know of your own knowledge whether a coil such as you saw when you made this examination could be completely flushed out, of your own knowledge? [214]

A. I believe that it could be.

Q. I say from your own knowledge? For instance, let me ask you this, you didn't see the inside of the coil? A. No, sir.

(Testimony of Francis P. Owens.)

Q. You never saw the coil before?

A. No, sir.

Q. Have you yourself ever flushed out or assisted or observed the flushing out of a coil such as you saw on this particular day?

A. No, sir.

Mr. Preston: That is all.

Mr. A. L. Maslan: Whether it was completely flushed out or not, if there was sulphuric acid in it, that would be dangerous, would it not?

The Witness: Yes, sir.

Mr. A. L. Maslan: That is all.

The Court: Step down.

(Witness excused.)

ARTHUR KEHLE

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [215]

Direct Examination

By Mr. Ben Maslan:

Q. What is your name, please?

A. Arthur Kehle.

Q. Where do you live?

A. At 12505 20th N. E., Seattle.

Q. How long have you lived in Seattle?

A. Fifteen years.

Q. What is your business or occupation?

A. Life insurance sales.

(Testimony of Arthur Kehle.)

Q. You have a managerial or executive position?

A. Yes, I am assistant manager.

Q. Of what company?

A. The Equitable Life Insurance Company of Iowa.

Q. How long have you been in the insurance business? A. Fifteen years.

Q. With the same company? A. Yes, sir.

Q. Do you have occasion during your work as such assistant manager—by the way, what territory do you take in?

A. The state of Washington, primarily western Washington.

Q. In your work as such, do you have occasion to become familiar with what are known as mortality tables or life expectancy tables? [216]

A. Yes, sir.

Q. What tables are commonly used in your business and in this vicinity?

A. Up to 1939, we used the American Table of Mortality, and then for approximately a year we were using the American Men's Table of Mortality, but in 1941 the insurance commissioners established what is known as the Commissioners' Standard Ordinary Table, which is now in use.

Q. Commissioners' Standard Ordinary Table?

A. Yes.

Q. By the commissioners you mean whom?

A. The insurance commissioners of the various states.

(Testimony of Arthur Kehle.)

Q. Is that table being generally used at the present time?

A. Yes, with our company and the majority of others also.

The Court: The commissioners what?

The Witness: The Commissioners' Standard Ordinary Table.

Q. Do you have a copy of that Commissioners' Standard Ordinary Table? A. Yes.

Q. Will you open it to the page, please? I think you have it contained in a booklet. [217]

A. Yes, I have it in my rate book.

The Court: Does it have a page number?

Mr. Ben Maslan: It is Page No. M-15, and along side of that are some figures, 4-46.

(Mortality Table marked Plaintiff's Exhibit 23 for identification.)

The Court: I would like to give the witness an opportunity to give that exhibit a name if he thinks there is a name that is attributable to it that reflects the character of the information contained in it.

Q. May I inquire whether or not that page can be taken out of that book without damage to the book? A. Yes, it can.

Q. Would you please take that out of the book?

The Court: In connection with your request to the witness, do you request that it be understood that the clerk's identifying marks to be attributable

(Testimony of Arthur Kehle.)

Q. You have a managerial or executive position?

A. Yes, I am assistant manager.

Q. Of what company?

A. The Equitable Life Insurance Company of Iowa.

Q. How long have you been in the insurance business? A. Fifteen years.

Q. With the same company? A. Yes, sir.

Q. Do you have occasion during your work as such assistant manager—by the way, what territory do you take in?

A. The state of Washington, primarily western Washington.

Q. In your work as such, do you have occasion to become familiar with what are known as mortality tables or life expectancy tables? [216]

A. Yes, sir.

Q. What tables are commonly used in your business and in this vicinity?

A. Up to 1939, we used the American Table of Mortality, and then for approximately a year we were using the American Men's Table of Mortality, but in 1941 the insurance commissioners established what is known as the Commissioners' Standard Ordinary Table, which is now in use.

Q. Commissioners' Standard Ordinary Table?

A. Yes.

Q. By the commissioners you mean whom?

A. The insurance commissioners of the various states.

(Testimony of Arthur Kehle.)

Q. Is that table being generally used at the present time?

A. Yes, with our company and the majority of others also.

The Court: The commissioners what?

The Witness: The Commissioners' Standard Ordinary Table.

Q. Do you have a copy of that Commissioners' Standard Ordinary Table? A. Yes.

Q. Will you open it to the page, please? I think you have it contained in a booklet. [217]

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The Court: Does it have a page number?

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Q. May I inquire whether or not that page can be taken out of that book without damage to the book? A. Yes, it can.

Q. Would you please take that out of the book?

The Court: In connection with your request to the witness, do you request that it be understood that the clerk's identifying marks to be attributable

(Testimony of Arthur Kehle.)

to the remaining part which has been marked, the part that he is taking out?

Mr. Ben Maslan: The identifying mark is attached only to that page, I understand.

The Court: Then your question should refer only to what is left as the exhibit. [218]

Mr. Ben Maslan: That is correct, Your Honor.

The Court: The Court authorizes the witness to return to his pocket what is now left of the book, and the Court directs that the bailiff now let counsel on both sides see what is marked as Plaintiff's Exhibit 23.

Mr. Ben Maslan: I offer that Table in evidence, being Plaintiff's Exhibit 23.

The Court: Is there any objection?

Mr. Preston: No objection.

The Court: Plaintiff's Exhibit 23 is now admitted.

(Plaintiff's Exhibit 23 received in evidence.)

The Court: I still would like to know what it is, if you will give the witness an opportunity to state what it is.

Q. Will you explain what that is?

The Court: Give it a one word name if you can which reflects the character or kind of information contained in the exhibit.

The Witness: It is a mortality table.

Q. Referring to Exhibit 23, the mortality table,

(Testimony of Arthur Kehle.)

I will ask you what life expectancy is shown for a person [219] 23 years of age?

A. For a person 23 years of age, the average life expectancy is 43.88 years.

The Court: 43.88?

The Witness: Yes, sir.

Q. There are other expectancy tables, are there not? A. Yes.

Q. Would you say that this is the latest and the one now usually accepted by insurance actuaries?

A. I might say that the lower right hand corner showing the 4-46 means that this table was modernized in April of 1946 so it is the most recent.

Mr. Ben Maslan: You may examine.

Mr. Preston: No questions.

The Court: You may step down.

(Witness excused.)

DONALD HILLIARD

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [220]

Direct Examination

By Mr. Ben Maslan:

Q. What is your name?

A. Donald Hilliard.

Q. Your residence is where?

A. 1809 10th Avenue N. W., Seattle.

(Testimony of Donald Hilliard.)

Q. How long have you lived in Seattle?

A. About 12 years.

Q. What is your business or occupation?

A. Certified Public Accountant.

Q. Where did you take your work, your university work or studies?

A. At the University of Washington.

Q. What degree did you receive there?

A. Bachelor of Business Administration.

Q. Did you take any examinations for that Certified Public Accountancy that you have?

A. Yes.

Q. Where was that? A. In Seattle.

Q. Under what jurisdiction?

A. The Washington Society of Certified Public Accountants, an examination of the American Institute.

Q. Is that a state regulated body?

A. It is. [221]

Q. Do you have any certificate from the State of Washington? A. I do.

Q. What is that certificate?

A. Certified Public Accountant.

Q. How long ago is it that you received your certificate as such? A. Nine years.

Q. During all of that time have you been practicing your public accountancy?

A. No, I was in the Army two years.

Q. What was your work in the Army?

A. I was auditing war contracts.

(Testimony of Donald Hilliard.)

Q. Are you in the practice of Certified Public Accountancy in Seattle? A. Yes.

Q. Where is your office?

A. Second & Cherry Building.

Q. Are you a member of any firm?

A. Barrios, Hilliard, Sain & Company.

Q. Does that firm have just one office in Seattle?

A. Only one office in Seattle.

Q. Do you have other offices? A. Yes, sir.

Q. Where? [222]

A. New York, Los Angeles, and New Orleans.

Q. In other words, this is a partnership?

A. Yes, sir.

Q. It has offices in these various cities you have mentioned including the one here in Seattle?

A. Yes, sir.

Q. At my request, you made some studies of figures based upon mortality tables or life expectancy tables, did you not?

A. I didn't make the study on the table, on life expectancy tables. I made computations based on annuity tables.

Q. You took more than one mortality, life expectancy table in your computation?

A. That's right.

Q. Which one did you use?

A. I used 40.17 years, 43.88 years.

Q. Those will be sufficient, I think, just those two for the time being. 43.88, that is the period that was mentioned by this last witness?

(Testimony of Donald Hilliard.)

A. Yes, sir.

Q. In order to procure an income each year for a period of, let's say, 40 years of \$3000 per year, how much money would a person have to invest if he could safely invest such money at $2\frac{1}{2}$ per cent per annum? [223]

Mr. Preston: Just a minute, if the Court please. We object to that as entirely incompetent, irrelevant and immaterial. The evidence in this case—there is no evidence of permanent total disability. The evidence is to the contrary. How could this be in any way helpful under those circumstances, and what qualification has there been shown from an investment standpoint of this witness making such a computation, assuming it were otherwise admissible or relevant. I object to it.

Mr. Ben Maslan: First of all, we do have definite evidence in the record that this man is industrially blind, that at the present time he is unable to work, and there is nothing to the contrary as far as the future is concerned. There is possibility, there is plausibility, there is conjecture that he might recover, etc., and that question of course is a matter for the jury to determine, percentages of recovery in the event of any recovery, whether there can be in the future ability to work, what percentage of ability to work may return and so forth.

The Court: The objection is overruled. As to the rate of return mentioned in the question as well as the other elements in the question, the right

(Testimony of Donald Hilliard.)

of [224] cross-examination will be reserved to defendant.

Q. Would you repeat the question.

(Last question read by reporter.)

The Court: Before answer is made, I ask counsel interrogating to state the reasons for using the 2½ per cent figure. Is there anything in the evidence on which that condition is stated?

Mr. Ben Maslan: No. That is a matter for argument as to the knowledge of the jurors from their individual outlook on life, and experience in life, the test being—I will give you the exact language of our Supreme Court on this very subject, where 2½ per cent was accepted as a figure. Although they said that it is not binding, they did accept 2½ per cent. They said, however, that is a matter for the jurors in their experience.

The Court: The question I wish you to answer when you make answer is whether or not that percentage figure has been approved in a similar question in another case and has been approved by the State Supreme Court.

Mr. Ben Maslan: Yes, Your Honor. I am going to ask on some other percentages, too, so as to give the jurors the possibility of figuring this thing out themselves. [225]

The Court: I will have to let you proceed.

Mr. Ben Maslan: You may answer the question. Is that my understanding, Your Honor?

(Testimony of Donald Hilliard.)

The Court: You may propound this question.

The Witness: The present value would be \$75,308.33.

Q. In other words, it would require that much of an investment today to procure such a return?

A. \$300. a year for 40 years—no, \$3000. a year.

Q. Assuming instead of \$3000. per year, what amount will be necessary to invest at the same rate, 21½ per cent, to procure a return of \$4000. per year for a period of, say, 40 years?

A. \$100,411.10.

Q. Let's put it this way now, what would it take to earn—what amount of money is necessary to invest at 21½ per cent to procure a return for 40 years of \$5000. per year?

Mr. Preston: That is objected to, if the Court please. There is no evidence.

The Court: There is no evidence up to now about \$5000., is there?

Mr. Ben Maslan: There is some evidence as I recall of Mr. Radinsky that up to this time this year his successor earned \$4500. I believe that was [226] the testimony, approximately \$100. per week, which is in the neighborhood of \$5000. per year. These are naturally approximate figures so that the jurors may judge the value.

The Court: I think the approximate figure should be within the limits of the evidence, and your last statement indicates that the \$5000. is not an accurate reflection of the testimony.

(Testimony of Donald Hilliard.).

Mr. Ben Maslan: My recollection—and I will be guided, of course, by the actual testimony—my recollection was that Mr. Radinsky did testify that during the year of 1949 to the present time the successor in the exact job earned \$4500. I may be mistaken and I will be corrected if I am. I think there are some exhibits which might throw some light on that.

Q. Will you answer that question?

Mr. Preston: We objected to the question.

The Court: I sustain that objection. You will have to submit the testimony as to the amount of the income. The testimony concerning the figure mentioned by you now was as to the time since February 20, 1948, to the end of that year.

Mr. Ben Maslan: That testimony has already been given previously but I am talking now about the [227] testimony for the year 1949, Your Honor. If I may, I think it will only take me a minute to look at this record.

The Court: You may do that.

Mr. Ben Maslan: I stand corrected, Your Honor. The figure was \$4500. for the entire year of 1949 and I will rephrase that question if I may?

The Court: Then the Court's statement will likewise be corrected because I made a mistatement according to your last information.

Q. Could you please give us the amount that would be necessary to invest at $2\frac{1}{2}$ per cent per annum to produce during a 40 year period \$4500. per year?

(Testimony of Donald Hilliard.)

A. I couldn't offhand. It would take three or four minutes for me to compute that amount. I have it only on the even amounts.

Q. In other words, you had made your figures based on the \$5000. I requested?

A. That's right.

Q. You say it would take you two or three minutes? A. Well, three or four.

The Court: Ask him another question.

Q. Let me ask you this, you couldn't say what it would be for \$4500. Would that or would that not be half way in between the figures for \$4000. and \$5000.? [228] A. It would not.

Q. It is a different formula? A. Yes.

Q. Taking the figures for 43.88 or as close as you can to that number of years, how much would it take to invest at the present time at $2\frac{1}{2}$ per cent per annum to procure \$3000. per year for that period of time?

Mr. Preston: It is understood, if the Court please, that our objection runs to all of these questions.

The Court: Let it be so understood and overruled.

The Witness: The present value, \$3000. for 43 years, would be \$71,945.71.

Q. On the basis of \$4000. per year, do you have those figures?

A. Yes, sir. Present value, \$4000. per year at 3 per cent is \$95,000.00.

(Testimony of Donald Hilliard.)

Q. I think you have my figures. I asked for 2½ per cent.

A. I thought I had already gone over those.

Q. Will you give me the 2½ per cent figure on \$3000. per year?

A. That is \$78,499.34.

Q. And you don't have the figures for \$4500., do you? [229]

A. No, I do not.

Q. If a person could procure a safe investment at 3 per cent per annum, let's get the figures on that. What sum would be necessary that the person would have to invest at 3 per cent per annum to produce \$3000. per year for 40 years?

A. The amount would be \$69,344.32.

Q. What amount would the person be required to have to invest at 3 per cent per annum to receive \$4000. per year for 40 years?

A. \$92,459.08.

Q. I gather that you don't have the figures for \$4500. per year, that being my error?

A. No, I do not.

Q. On the basis of 43 years, what would be required to invest at 3 per cent to procure \$3000. per year for 43 years?

A. \$71,945.71.

Q. What investment would be required if made at 3 per cent per annum to receive \$4000. per year for 43 years?

A. \$95,927.60.

Mr. Ben Maslan: You may examine.

Mr. Preston: In lieu of cross-examination is a motion to strike for the same reason assigned and

(Testimony of Donald Hilliard.)

for the further reason that the evidence assumes—the [230] testimony of the witness assumes without any evidence to support it that a person at the age of 23 years is going to earn these figures for 40 or 43 years and be earning them during that period. That is the additional ground of our motion to strike the entire testimony of this witness insofar as he has given any figures to the jury.

The Court: The motion is denied. Is there any cross-examination?

Mr. Preston: No, in lieu of cross-examination we move to strike.

The Court: You may be excused from the stand.

(Witness excused.)

GEORGE HAYNES

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. A. L. Maslan:

Q. Your name is George Haynes?

A. Right.

Q. Where do you live? [231]

A. 2710 Yesler Way, Seattle.

Q. 2710 Yesler Way, Seattle, Washington?

A. Yes, sir.

Q. Are you a married man?

A. Yes, sir.

(Testimony of George Haynes.)

Q. Are you Oscar Haynes' father?

A. Yes, sir.

Q. How many children do you have?

A. Seven.

Q. How old is Oscar now?

A. He was born in 1926.

Q. Would you say he is 23 years old now?

A. Yes, sir.

Q. Is he the oldest? A. Yes, sir.

Q. Where do you work?

A. I work at 2750 Fourth Avenue South.

Q. For whom do you work?

Mr. Preston: Is that material, if the Court please?

The Court: The objection is sustained.

Mr. A. L. Maslan: We are just qualifying him.

The Court: You might ask him if he knew anything about the accident?

Mr. A. L. Maslan: I am coming to that. [232]

The Court: Go to that directly.

Q. Do you recall the accident that happened to Oscar? A. Yes, sir.

Q. When did you first learn about the accident?

A. February 20, 1948.

Q. What time of day?

A. About between four and five o'clock, I presume.

Q. What did you do as soon as you found out about the accident?

(Testimony of George Haynes.)

A. I rushed home and got the wife and we went to the hospital.

Q. Where was the hospital?

A. In Tacoma, Washington.

Q. What did you find when you got to the hospital?

A. I found my boy there with his head all bound up and swollen and in terrible pain.

Q. What gave you the thought that he was in terrible pain?

Mr. Preston: This is cumulative. There is no dispute about this, is there?

The Court: The objection will be overruled. If there is no dispute, plaintiff may consider that, and in view of opposing counsel's statement, I think counsel for plaintiff would wish to be as brief as [233] possible.

Mr. A. L. Maslan: I am going to make it very brief. I am also coming to the steps in relation to the admission of this evidence. I feel that it is necessary to proceed as follows:

Q. How long was Oscar in the hospital?

Mr. Preston: We concede it was 58 days and the record so shows.

Q. Do you remember what Oscar was wearing the day of the accident? A. Yes, sir.

Q. What was he wearing?

A. Those clothes on the table.

Q. Where did you get these items of clothing?

(Testimony of George Haynes.)

A. From the hospital, from where he was at in Tacoma.

Q. Did you pursuant to my direction and in my presence deliver these articles of clothing to Mr. Owens, the chemist? A. Yes, sir.

Q. For analysis? A. Yes, sir.

Q. And this is the same clothing?

A. It is.

Q. You recognize this clothing as such?

A. Yes, sir. [234]

Q. This bottle as has been testified contained some liquid or some compound. Where did you get that compound?

A. From the trailer part of the truck that the boy was hurt on, from where it had spewed out and had piled up there on the truck.

Q. How did you happen to notice that?

A. It was in the yard and I went to see it the next morning when I went to work. This was lying there of necessity over the back of the truck so I took a stick and scraped some of that stuff off into the bottle.

Q. And that was in this bottle?

A. Yes, sir.

Q. Pursuant to my direction, you delivered that over to the chemist at a later date?

A. That's right.

Mr. A. L. Maslan: At this time, may it please Your Honor, I offer these articles in evidence, Exhibit 22.

(Testimony of George Haynes.)

The Court: Exhibit 22 is now admitted.

(Plaintiff's Exhibit 22 received in evidence.)

Mr. A. L. Maslan: Take the witness.

Mr. Preston: I have no questions.

The Court: You may step down. [235]

(Witness excused.)

Mr. Ben Maslan: I will call Oscar Haynes.

The Court: Do you recall the plaintiff?

Mr. Ben Maslan: Yes, Your Honor, for a question relative to the election that was discussed. The record will show that the plaintiff is now back on the witness stand.

The Court: He has been previously sworn and he may now further testify.

OSCAR VIRGIL HAYNES

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ben Maslan:

Q. I think you testified earlier in the case that you were working for B. Radinsky & Son and that as such workman you were under the Workmen's Compensation Act? A. Yes, sir.

Q. Prior to the start of the trial of this case against the Pennsylvania Salt Manufacturing Com-

(Testimony of Oscar Virgil Haynes.)

pany, did you or did you not elect or choose to sue or go against [236] the Pennsylvania Salt Manufacturing Company rather than against the Workmen's Compensation Fund? A. I did.

Mr. Ben Maslan: You may examine.

Cross-Examination

By Mr. Preston:

Q. When did you make the election?

A. It was after I come out of the hospital.

Q. By what means?

A. I consulted my lawyer.

Q. You had previously made claim to the Department of Labor and Industries on the basis of this accident, hadn't you? A. Yes, sir.

Q. And you had received payments thereunder, had you not? A. I received two.

Q. Two payments from the State?

A. Yes, sir.

Q. Do you remember the amounts of those approximately? A. \$75.00, I believe.

Q. Was that election you made by some writing?

A. I signed something in the hospital, it was just a few days after I was there. I don't exactly know what it [237] was.

Q. I am speaking not of your original claim to the Department, but you spoke of an election afterwards not to take, as you termed it, under the Act but to maintain a third party action and that is

(Testimony of Oscar Virgil Haynes.)

what I am inquiring about, as to what form that election took?

The Court: If you remember the form of it you can now state; if you do not remember and cannot answer you are entitled to say what the fact is about your ability to answer.

The Witness: I don't remember that.

Q. You answered counsel to the effect that you made an election, but you don't remember whether it was oral or writing or what, I take it, is that correct?

A. I believe that was in writing.

Q. You signed something in writing?

A. Yes, sir.

Q. Would you produce that please?

Mr. A. L. Maslan: We have the original file.

The Court: Produce it for the inspection of counsel cross-examining.

Mr. Ben Maslan: While the records are being produced, the moneys that you received from the Department of Labor and Industries were returned at your direction by your lawyer, A. L. Maslan to the [238] Department of Labor and Industries, isn't that correct?

The Witness: They were.

Mr. Ben Maslan: So that actually you have in actual fact never received any money from the Department of Labor and Industries?

The Witness: No, sir.

Mr. Ben Maslan: As soon as you were advised

(Testimony of Oscar Virgil Haynes.)

of your rights by your lawyer, you have always taken the position that your suit, your claim, is against the Salt Manufacturing Company?

The Witness: Yes, sir.

Mr. A. L. Maslan: May I make this suggestion?

The Court: Yes.

Mr. A. L. Maslan: These are the original records of the Department of Labor. May we introduce these with the privilege of having copies substituted at a later date?

The Court: Before the Court answers, I would like to get the attitude of opposing counsel and he probably will want to look at them for a moment.

Mr. Preston: I would like to look at them, but I imagine that would be perfectly all right.

Mr. Ben Maslan: There are some things that are not germane to this question. I think perhaps we should take them out. [239]

The Court: As I understand, the election, the form of election is now under consideration?

Mr. Ben Maslan: Yes, Your Honor.

The Court: Give attention to that and leave the other matters for some other time.

Mr. Ben Maslan: When was it that you retained A. L. Maslan, or our law firm, Maslan & Maslan at that time, since then, Maslan, Maslan & Hanan, to press your claim against the Pennsylvania Salt Manufacturing Company?

The Witness: I believe it was in the month of July.

(Testimony of Oscar Virgil Haynes.)

Mr. Ben Maslan: Of 1948?

The Witness: Yes, sir.

The Court: I think counsel should be familiar with these records.

Mr. Ben Maslan: This is the Department of Labor record, Your Honor.

The Court: Let opposing counsel look at it.

Mr. Starin: We are entitled to see the record as a whole, if the Court please. It is a public document.

Mr. Ben Maslan: I am not trying to hold anything from you, counsel.

The Court: The Court will let counsel for both [240] sides have another five minutes while we are all together to see if you can find what you are looking for. Act as expeditiously as possible. Do you have available copies?

Mr. Ben Maslan: We do not have available copies but we will take out the appropriate parts, with counsel's aid.

The Court: Will counsel on both sides take out the part of the file which they wish to use and further deal with it? Remove it so that you will have it in a form to expedite the physical work in that respect.

(Compensation records marked Plaintiff's Exhibit 24 for identification.)

Mr. Ben Maslan: Your Honor, I offer that portion of the Department of Labor records as evi-

(Testimony of Oscar Virgil Haynes.)

dence purely on the question of election of remedies.

The Court: Is there any objection?

Mr. Preston: Yes, Your Honor. I asked for one thing and that was the writing to the effect that an election was made, propounded by counsel. That is all I inquired about. These other matters are immaterial. The only thing that has any relevancy is [241] the one letter I asked for.

The Court: Does Plaintiff's Exhibit 24 contain that letter?

Mr. Ben Maslan: It contains that.

Mr. Preston: And a number of others, Your Honor.

Mr. Ben Maslan: They are all part and parcel of that, Your Honor. You can't disengage one.

The Court: You will have to prove that.

Mr. Ben Maslan: I will be glad to have Your Honor see this.

The Court: You will have to ask the proper witness concerning proper authentication of the entire exhibit, including all parts thereof.

Mr. Ben Maslan: A. L. Maslan, will you please take the witness stand.

The Court: Do you wish this witness excused from the witness stand?

Mr. Ben Maslan: For the time being, Your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Do you wish to reserve the right to have this witness argue the case before the jury?

Mr. Ben Maslan: I would like to have that reservation, but if he is going to argue he will argue on other questions entirely, nothing to do with this. [242]

The Court: I don't think we had better get into the question of possible error or incorrectness or inaccuracy as to what he is going to argue. Is there any objection to this witness reserving the right to argue this case before the jury?

Mr. Preston: I think that is the general rule, if he takes the stand in a case, he couldn't argue.

Mr. Ben Maslan: The witness will waive the right to argue.

A. L. MASLAN

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ben Maslan:

Q. Your name is A. L. Maslan?

A. Yes, sir.

Q. And you are an attorney at law?

A. That is right.

Q. Admitted to practice in this Court and in the courts of the state of Washington?

A. That is right. [243]

Q. I believe in April or May, 1948, you were

(Testimony of A. L. Maslan.)

contacted and retained by Oscar Haynes, the plaintiff in this action to take some action for him in regard to injuries that he had sustained in an accident? A. I did, I was, rather.

Q. Is that the particular accident that we have been trying this case about, the one that occurred on February 20, 1948? A. That is right.

Q. What was your first action, if any, taken by you in connection with the election required under the Statute?

A. I addressed a letter to the Department of Labor and Industries dated May 4, 1948.

Q. If you will look back, you will find one in April, I think. Isn't there something in connection with Mr. Haynes' signature or authorization?

A. Attached to that letter of May 4th was a letter also addressed to the Department of Labor and Industries dated April 26, 1948, signed by Oscar Haynes and O.K.'d by George Haynes as the father.

Q. Then when next did you write, either you or Oscar Haynes or you for Oscar Haynes write a letter to the Department of Labor and Industries relative to the situation?

A. I then wrote on May 11, 1948 to the Department of [244] Labor and Industries.

Mr. Preston: Your Honor, I object. The exhibit speaks for itself.

Mr. Ben Maslan: I offer these exhibits in evidence, Your Honor.

Mr. Preston: I am speaking of the one thing

(Testimony of A. L. Maslan.)

we inquired about, and that was the writing evidencing an election. I didn't inquire about anything else, and other preliminary steps, I submit, are of no consequence or materiality and the letter speaks for itself. It is dated and says what subject matter we are discussing.

The Court: The jury will be excused until 2:00 o'clock and may now retire under the Court's previous admonitions.

I suggest that you remove from Plaintiff's Exhibit 24 that paper which admittedly is admissible and give it a different clerk's identifying mark and then afterwards deal with the remaining portions of Plaintiff's Exhibit 24 in such manner as you may be advised. Will counsel separate that one which both sides agree is admissible? Is that the one defendant admits is admissible? Let it be marked Plaintiff's Exhibit 25. It is taken from Plaintiff's Exhibit 24 for identification. [245]

(6-8-48 Letter marked Plaintiff's Exhibit 25 for identification.)

The Court: Do you offer Plaintiff's Exhibit 25 in evidence?

Mr. Ben Maslan: Yes, Your Honor.

The Court: Is there any objection?

Mr. Preston: No objection.

The Court: Plaintiff's Exhibit 25 is now admitted.

(Plaintiff's Exhibit 25 received in evidence.)

The Court: The Court is about to take the noon

(Testimony of A. L. Maslan.)

recess. Is there anything you wish to do in the absence of the jury?

Mr. Ben Maslan: I think we can discuss this now. I have some other letters here. We have this letter of May 4th. I may read it to show it is along the same line.

The Court: If you have reason to believe that it is admissible and will be later admitted, even over objection, I suggest you have the matter given another mark so that the record will show at all times to what you refer.

(5-4-48 and 4-26-48 Letters marked Plaintiff's Exhibit 26 for identification.) [246]

The Court: Let defendant's counsel see Exhibit 26. Mr. Maslan, can you give Plaintiff's Exhibit 26 for identification a name which you believe will not be objectionable in the minds of defendant's counsel?

Mr. Ben Maslan: Your Honor, may I refer to Plaintiff's Exhibit 26 for identification? This is a letter dated May 4th, 1948. It is addressed to the Department of Labor and Industries, Olympia, Washington.

“Gentlemen:

In Re: Oscar Haynes—B-575 312

Enclosed herewith find letter of Authority signed by Oscar Haynes.

For your information we are contemplating taking proceedings against the Penn. Salt Company

(Testimony of A. L. Maslan.)

for personal injuries sustained by Mr. Haynes. We feel that he is entitled to substantial damages against the chemical company. I presume that it would meet with your approval in the event that we are able to sustain a case against the chemical company.

We would appreciate your sending the file to your Seattle Office so that we might peruse the same so that we might obtain possible information in regard to the proposed action against the said Company. [247]

I would be pleased to discuss this matter with your agent in charge of this particular case and would appreciate hearing from you at your earliest convenience."

It is signed Maslan & Maslan, by A. L. Maslan.

Attached to that, signed by the plaintiff himself, witnessed by George Haynes, the father, is a letter dated April 26, 1948, to the Department of Labor & Industries, Olympia, Washington.

"Gentlemen:

Re: Oscar Haynes—B-575 312

This will advise that I have retained the firm of Maslan & Maslan to prosecute my claim for damages for personal injuries sustained when I was injured on the 20th day of Feb., 1948, in Tacoma while loading a car of pipe for my employer, B. Radinsky & Son. This claim is for damages against the Penn. Salt Co. and or any other agency or in-

(Testimony of A. L. Maslan.)

surance Co. that might be involved. You are hereby authorized to allow the said Maslan & Maslan or their agents to discuss this case with you and to check your files in my behalf." [248]

The Court: What is the difference in form and content of the letter you last read from Plaintiff's Exhibit 25? What is the difference between Plaintiff's Exhibit 25 now in evidence?

Mr. Ben Maslan: This one, Your Honor, has Haynes' signature attached to it. That one has the signature of A. L. Maslan. It is true that in the record Mr. Haynes testified that he hired and retained Maslan & Maslan, A. L. Maslan.

The Court: Court is recessed until 2:00 o'clock this afternoon.

(At 12:40 o'clock p.m., Wednesday, November 23, 1949, proceedings recessed until 2:00 o'clock p.m., Wednesday, November 23, 1949.)

Seattle, Washington; November 23, 1949—
2:00 o'Clock, P.M.

The Court: You may proceed in the case on trial.

Mr. A. L. Maslan: May it please Your Honor, I believe I was on the witness stand, but prior to that time there is an exhibit which has been agreed upon by [249] counsel.

The Court: Exhibit 25 has been admitted. Exhibit 26 does contain a reference to insurance. I thought counsel were withdrawing from 24 the so called election by the signature of the plaintiff, and this is the first time I personally have inspected

this particular thing which has been admitted as Plaintiff's Exhibit 25. I thought what you were going to have marked as Exhibit 25 was the paper signed by the plaintiff.

Mr. Ben Maslan: That is the one counsel agrees can go in.

The Court: It has already been put in evidence. You see no objection to that on the ground of reference to insurance?

Mr. Ben Maslan: "This claim is for damages against the Penn. Salt Co. and/or any other agency or insurance co. that might be involved."

The Court: That is what I had in mind.

Mr. Ben Maslan: I would suggest this in connection with that, that Mr. Maslan be allowed to read that letter into the record, leaving out that particular sentence.

The Court: It is not in evidence yet, is it?

Mr. Preston: We object to it entirely on the ground it is immaterial and irrelevant and for the [250] further reason that it contains extraneous prejudicial matters.

Mr. Starin: It is hearsay as far as we are concerned, Your Honor.

The Court: Any word used by this plaintiff in his transactions with the State Department concerning his proceeding or not proceeding under the Workmen's Compensation Act, so far as the words spoken are concerned, would be hearsay as to your client, no question about that, but in my opinion that will not keep the plaintiff from introducing

evidence of his acts, if any, which he did respecting that matter, if they are pertinent to the issues in this case.

Mr. Starin: The only pertinent issue here is the notice of election.

The Court: I understand that is what counsel for the plaintiff are trying to address their efforts to right now.

Mr. Ben Maslan: Yes, Your Honor. We urge it is admissible but if there is a question about that line in there—we do not think it is prejudicial, but if Court or counsel feel that, I think we can read it into the record without it.

Mr. Preston: We don't think it is material, in any event. The election, the notice of election is in [251] the letter previously admitted. It is No. 25, I believe.

The Court: Do counsel for plaintiff understand written data to be in effect as defendant's counsel just stated, that the direct election is in the letter written by counsel for the plaintiff?

Mr. Ben Maslan: Not necessarily. Very frankly, I think the election is shown by all these various documents, unless counsel agrees that there has been an election, then we don't need any of this.

The Court: You mean unless counsel for defendant disputes or denies the fact that there has been an election as required by law before the suit was brought is that what you mean?

Mr. Ben Maslan: Something like that, Your Honor. There is a 149 Washington Decision on

that. There are two decisions which I would like to bring to Your Honor's attention. One is a Federal decision which refers to the election on the Harbor Workers' Act and cites this Washington case. I would like to bring it to your attention, if I may.

Mr. Preston: Your Honor, I think we could save time. I don't think counsel will go along with us but we are willing to concede Exhibit 25 constitutes an election as of that date. I can't see where anything [252] else has any materiality. I don't know whether counsel wants to labor the point beyond that or not.

The Court: I assume counsel wants to belabor it to the extent necessary to get by the requirement that he prove and establish over objection, if necessary, and sufficient to stand up under any review by an appellate court, that the plaintiff at the proper time made an election and by doing so lawfully pursued his present remedies asserted in this case. I assume that is what counsel is proposing to do, unless you are willing to admit plaintiff made a lawful election necessary to enable him to proceed with and maintain this action.

Mr. Starin: I think, Your Honor, we can concede that an election was made by the letter that is in evidence. The date of the election appears upon the face of that exhibit. The date this action was commenced appears upon the face of this exhibit. I do not think we should be put in the position of conceding that it was lawful. That is a conclusion.

The Court: I do not think you should be put in the position against your consent of agreeing to anything.

Mr. Preston: I think we have stated the extent to which we are willing to agree, that Exhibit 25, [253] which states the date and the fact of election, is sufficient to prove that election. Anything else is immaterial. We will concede that letter constitutes an election.

The Court: If you notwithstanding such concession argue that it was not a lawful election necessary to enable the plaintiff to maintain this action, then the case is not finished on the question of whether a valid election was made. It will be necessary for the plaintiff to show that valid election was made as of the time necessary in law that the election be made. I understand from your admission you do not admit or concede any such thing.

Mr. Preston: No, Your Honor.

The Court: What do you want to do, if anything?

Mr. Ben Maslan: We want to show the entire course of conduct.

The Court: Then you will have to proceed.

Mr. Ben Maslan: Commencing with the time that our office was retained in connection with this election.

The Court: You will have to proceed. Let the witness take the stand. [254]

A. L. MASLAN

Direct Examination

(Continued)

By Mr. Ben Maslan:

Mr. Ben Maslan: Should the jury be here, Your Honor?

The Court: It seems to me, we might as well try this out on voir dire and see if it is admissible.

Q. Mr. Maslan, the first occasion that any action was taken relevant to an election of remedies was what, according to your recollection and your memorandum that you have?

A. That was in the latter part of April, 1948.

Q. What happened then?

A. At which time Mr. Haynes, Sr., George Haynes, the father of the plaintiff, called me to visit him at his home, which is approximately eight blocks away from where I live. On my way home one evening, I stopped——

Q. I do not think you need go into that. What was done in connection with that, in other words, after you conferred with your client, Mr. Haynes?

A. After discussing the matter and the facts with Mr. Haynes and the boy, the present plaintiff, I advised him that in my opinion he had a cause of action against the Pennsylvania Salt Manufacturing Company and to that end I [255] obtained from him a letter dated April 26, 1948, addressed to the Department of Labor and Industries at Olympia, Washington.

(Testimony of A. L. Maslan.)

Q. Is that the same letter that is attached to this exhibit marked Plaintiff's Exhibit 26? Would the bailiff show that to the witness?

A. I have a copy in my file. That is the letter.

Q. What did you do with the letter? That was signed by Oscar Haynes, the plaintiff, and witnessed by his father on April 26, 1948? What did you do with that letter?

A. I retained the letter for several days in my file and then on May 4, 1948, I addressed a letter to the Department of Labor and Industries, Olympia, Washington, and attached the letter signed by Oscar Haynes and witnessed by his father, George Haynes, to the letter dated May 4, 1948, addressed by me to the Department of Labor. You are now referring to Exhibit 26?

Q. Exhibit 26 for identification, of course, it has not yet been admitted. I think that letter has been read to Your Honor.

The Court: Let me see it. The April 26th letter is the one that has the reference to the insurance company in it, signed by Oscar Haynes, April 26, 1948, addressed to the Department of Labor and Industries. That is a part of Plaintiff's Exhibit 26 for [256] identification.

Mr. Ben Maslan: That is correct, Your Honor.

The Court: It seems to me that if there is a definite statement to the Department subsequent to May 4th that there is no materiality about May 4th. There is no necessity for introducing the ne-

(Testimony of A. L. Maslan.)

gotiations if the negotiations were accomplished by final position. Let me see Plaintiff's Exhibit 25. You have not shown any right yet, in my opinion, to introduce the preliminary leading up to that. That seems to be the accomplished fact. Exhibit 25 bears date of the 8th of June, does it not? Referring now to Plaintiff's 26, is there objection to that?

Mr. Preston: Yes.

The Court: The objection will be sustained.

Mr. Ben Maslan: Note an exception to that, Your Honor.

The Court: Allowed.

Mr. Ben Maslan: We sincerely feel that it is part of the record of election.

Q. What further was done subsequent to the letter of June 8th, after Exhibit 25 was sent?

A. Subsequent to that time, the Department in a letter advised me——

The Court: Unless the letter is in, if there is [257] any objection to it, you are not entitled to say what the contents are.

Q. Do you have such a letter from the defendant? A. Yes.

Q. Could I look at that?

The Court: Let the clerk mark it as Exhibit 27.

The Witness: On June 1—on May 14, a letter was received by me—will you mark that, and I will read it.

The Court: You cannot read the contents of something that is not in.

(Testimony of A. L. Maslan.)

(5-14-48 Letter marked Plaintiff's Exhibit 27 for identification.)

The Court: To what subject does Plaintiff's Exhibit 27 relate?

Mr. Ben Maslan: Could I see Plaintiff's Exhibit 25? This letter of June 8 refers to that letter from the Department dated May 14th and encloses the check that they mention as the necessary amount to reimburse the Department.

The Court: You may inquire of the witness touching its qualifications. You might ask the witness concerning the subject matter of your statement.

Q. What did you do relative to the request of the [258] Department containing the letter of May 14th which has been marked for identification as Exhibit 27?

A. Has Your Honor read that letter?

The Court: I know something of the contents of that.

The Witness: Then in answer to the letter of May 14th——

Mr. Preston: Your Honor, we could concede, it has been so testified that the amounts required by the defendant were paid back.

The Court: Such a concession does not necessarily deprive the party of the right to have the evidence on which the concession is made introduced in evidence before the Court and jury. If counsel

(Testimony of A. L. Maslan.)

is satisfied to rest the matter upon your concession, the Court would think that would be a splendid thing to do but the Court knows of no way of requiring counsel to do so.

Mr. Ben Maslan: The point is, there is not a complete admission. In view of that fact, we have to go into the details of this.

The Court: What is there before the Court respecting Exhibit 27?

Mr. Ben Maslan: I offer that in evidence as a letter received from us by the Department of Labor and [259] Industries.

The Court: What is the attitude of opposing counsel regarding this offer?

Mr. Preston: That is objected to as immaterial and irrelevant, hasn't any bearing upon any issue in this case.

The Court: I ask the witness to let the Court know what he understands the nature of the letter to be, what subject matter is discussed?

The Witness: In that letter, may it please Your Honor, of May 14th, which is Plaintiff's Exhibit 27, it states that they——

The Court: Just say what the subject is.

The Witness: They acknowledge the receipt of my letter of May 4th, Your Honor, and they stated that if an action is to be brought they must insist that any payments that have heretofore been made by the defendant in behalf of Oscar Haynes be refunded by Oscar Haynes to the Department, and they ask for a total of \$267.50, for two payments at

(Testimony of A. L. Maslan.)

\$75. per month or \$150., and \$112. covering payments out of the Medical Aid Fund made by them.

The Court: Will you look at Plaintiff's Exhibit 25?

The Witness: Yes, Your Honor. On Plaintiff's [260] Exhibit 25, there is a letter dated June 8, 1948, sent by me personally to the Department of Labor wherein I stated that "We are preparing summons and complaint in this action and will forward a copy to you within the next few days." I further stated that the check in the sum of \$267.50 requested by the Department will also be sent, and then I further stated that "This letter confirms our previous letter to you wherein the above Oscar Haynes hereby elects to prosecute his claim for damages . . ."

The Court: That has no bearing on this other letter. You may inquire further. Is there anything else which was done? Is there any written evidence of doing what was promised to be done in regard to these payments?

Q. Did you ever send those checks back, the money back?

A. Yes, I did. Then subsequently——

Q. Did you enclose a check with Exhibit 25?

A. No, I didn't. I did that on a different date, counsel. On July 20th I sent——

The Court: Is there a communication or a copy of a communication on that date concerning this matter to which you wish to refer?

(Testimony of A. L. Maslan.)

Mr. Ben Maslan: Yes, Your Honor. [261]

The Court: Let it be marked Plaintiff's Exhibit 28.

(7-20-48 Letter marked Plaintiff's Exhibit 28 for identification.)

Q. What is this letter of July 20th?

A. That is a letter in which I enclosed our check in the sum of \$192.50, plus the State of Washington check No. 459621, dated May 4, 1948, in the sum of \$75., which had been uncashed by Oscar Haynes. I further stated in the letter——

The Court: Never mind what you stated in the letter. About what subject did you write, if anything?

The Witness: That was in answer to the demand of the Department of Labor for the sum of \$267.50.

The Court: Is it a fact, as I understand your statement, that this letter of July 20th, 1948, was a letter transmitting the payments mentioned in the Department's letter to you dated May 14, 1948.

The Witness: Yes, Your Honor.

Mr. Ben Maslan: I offer that letter in evidence.

Mr. Preston: No objection.

The Court: That letter is now admitted. [262]

(Plaintiff's Exhibit 28 received in evidence.)

Mr. Ben Maslan: Will you please have this check marked?

(Testimony of A. L. Maslan.)

(Check marked Plaintiff's Exhibit 29 for identification.)

Q. What is Exhibit 29?

A. That is a check that I received back from the Department of Labor, together with a letter from the Department of Labor.

Q. That was your check originally?

A. That was my original check of \$192.00.

The Court: Sent with what letter?

The Witness: That was sent with the letter dated July 20th.

The Court: In evidence as Plaintiff's Exhibit 28?

The Witness: Yes, Your Honor. This Exhibit 29, may it please Your Honor, is the check dated July 20th which was enclosed in the letter dated July 20th marked Exhibit No. 28, in the sum of \$192.50.

Q. Why was that sent back to you?

A. It was sent back to me for the reason that the Department of Labor had checked the amount and had found [263] that I had overpaid them and they wanted a lesser amount. When I say overpaid them, may I explain that, Your Honor?

The Court: You may.

The Witness: By that, there was an error in figuring, and they had calculated that they had paid some five or six dollars more than they actually had paid, and they had sent me the check of \$192.50 back

(Testimony of A. L. Maslan.)

and demanded from me in lieu thereof a check in the sum of \$187.50.

Q. What date was the letter you got from the Department?

A. I am looking for that letter. The original is in the file. You have the original there, counsel.

Q. Do you find the original letter from the Department dated August 17, 1948?

A. That is what I am looking for.

The Court: The check dated July 20, 1948, has been marked Plaintiff's Exhibit 29.

Mr. Ben Maslan: I offer that in evidence, Your Honor.

The Witness: It was enclosed with that letter.

The Court: The letter has not been marked. Do you wish this letter attached to Exhibit 29?

Mr. Ben Maslan: Yes, I think they should be attached together and I will offer them in evidence as one exhibit.

The Court: Let it be attached. The offer is made of Plaintiff's Exhibit 29, consisting of this letter and the check which it purports to have returned to the witness. That exhibit, consisting of those two parts, is now admitted.

(Plaintiff's Exhibit 29 received in evidence.)

The Witness: May I advise Your Honor of the contents thereof?

The Court: Yes, you may.

The Witness: The contents of that letter, dated

(Testimony of A. L. Maslan.)

August 17th, refers to the Oscar Haynes case and states, "Enclosed is your check in the amount of \$192.50, intended as a refund of certain payments made in connection with this claim.

"We find upon review of the file that the correct amount should have been \$187.50. Therefore, will you kindly forward the latter sum pending action against the third party."

It is signed by the Department of Labor and Industries, M. P. Gilbert, Assistant Claim Agent.

Q. Subsequent to that, did you send them the correct [265] amount, and if you did, was it contained in any letter or communication?

A. It was a letter subsequently sent by me to the Department, dated September 16, 1948, in which I enclosed the sum requested by the Department in the sum of \$187.50.

The Court: Do you have that letter or a copy of it?

The Witness: I have a copy.

Mr. Ben Maslan: We have the original.

The Court: Let one of them be marked.

The Witness: It is a letter dated September 16th.

Mr. Ben Maslan: It has a copy of the complaint attached to it. If we attached the check to Plaintiff's Exhibit 24——

The Court: Plaintiff's Exhibit 24 has been diminished in size and number of papers so that at this time it consists of a letter purporting to bear

(Testimony of A. L. Maslan.)

date September 16, 1948, written by Maslan & Maslan, addressed to the Department of Labor and Industries at Olympia, to which is attached a purported copy of the complaint.

Mr. Ben Maslan: Also, we are attaching the check to it.

The Court: Let that check be attached to it. Let opposing counsel see its present form. Have you offered it? I do not know whether there has been any [266] proof relating to it or not.

The Witness: I sent that letter of September 16, enclosing the copy of the summons and complaint which had heretofore been requested by the defendant, together with the check in the sum of \$187.50 which they had heretofore requested, and the enclosures and the letter marked Plaintiff's Exhibit 24 and those were enclosed by me and subsequently received by the Department and taken from their file.

Mr. Starin: We have only this question concerning it. We are not familiar with it. The Court does submit pleadings to the jury. If it isn't the practice to submit pleadings to the jury, then the jury would have this in this form.

The Court: In my opinion, the plaintiff is entitled to show all the acts materially bearing upon plaintiff's claimed election, and I do not think that your point made in connection with the nature of that writing will sufficiently prevent the plaintiff

(Testimony of A. L. Maslan.)

from enjoying its right to have evidence of its act in that connection adduced in evidence.

Mr. Preston: If Your Honor please, as you will note from this letter, this has nothing to do with an election. This recites the fact that an action has already been started and sends them a copy of the [267] summons and complaint.

The Court: Do counsel wish that summons and complaint there?

Mr. Ben Maslan: No, Your Honor. We had just as well withdraw the complaint in view of counsel's objection.

The Court: Mr. Clerk, would you eliminate from that exhibit that large paper entitled "Complaint" and return it to counsel who produced it, and then keep the two remaining papers or objects together.

Mr. Ben Maslan: With the complaint deleted, we move the admission of that exhibit.

The Court: Consisting of what?

Mr. Ben Maslan: Consisting of the letter of September 16 and the check of \$187.50.

Mr. Preston: We think it is immaterial, if the Court please.

The Court: The objection is overruled and this exhibit consisting of those two parts last mentioned by counsel is now admitted.

(Plaintiff's Exhibit 24 received in evidence.)

Mr. Ben Maslan: Is there anything else, Mr. Maslan? I think with the exception of the letter of

(Testimony of A. L. Maslan.)

May 5th, which includes the letter of April 26th, which is Exhibit—— [268]

The Court: The letter of May 4th and the letter of April 26th are bound together as one exhibit, namely, Plaintiff's Exhibit 26 and the letter of April 26 has in it that statement about insurance. Are you offering that exhibit now?

Mr. Ben Maslan: Yes, Your Honor.

The Court: If counsel can assist the Court in excluding from the jury's attention those words relating to insurance, I think the remainder of it is admissible. As a matter of fact, it is all admissible but by reason of the unnecessary prejudice to the defendant's interests in this case of those words referring to insurance, they must be covered up and deleted in some manner. Either they must be cut out or else they must have a piece of paper pasted over them, and if they are eliminated from it, the trial proceedings in the absence of the jury should show that they are eliminated.

Mr. Starin: That matter has been submitted and the Court has sustained our objection to it.

The Court: I have previously, but the matter is presented in a different light now. I believe the additional circumstance just mentioned further authenticates and establishes admissibility for Plaintiff's Exhibit 26. [269]

Mr. Ben Maslan: I might state this, that we do not say there is an insurance company. This is what we say in this letter, "This claim is for damages

(Testimony of A. L. Maslan.)

against the Penn. Salt Co. and/or any other agency or insurance Co. that might be involved." We do not know. We are not making any claim to that effect, Your Honor.

The Court: In view of the objection to the admission, the Court is going to eliminate every possible obstacle. The record of proceedings in the absence of the jury can show what those words are, but those words in my opinion need not go to the jury because of the risk of doing greater harm to the defendant than the presence of those words before the jury would do in favor of the plaintiff's case.

Mr. Ben Maslan: As a matter of fact, Your Honor, we sincerely feel that this whole question of election is a question of law for the Court, in view of its present status, the extent to which it has come.

The Court: If you wish to submit it as such, there is no harm done. If you intend to not ask that the jury look at those papers, then the Court will rule.

Mr. Ben Maslan: We feel that the Court should instruct the jury as a matter of law that an election has been made pursuant to law and that they should disregard the Workmen's Compensation Act.

The Court: The possibility of your taking such a position was one reason that caused the Court to have these proceedings in the absence of the jury.

(Testimony of A. L. Maslan.)

Mr. Ben Maslan: That is our position, Your Honor.

The Court: Plaintiff's Exhibit 26 is now admitted as to each and both of its parts, and I direct in that connection that this exhibit be not submitted to the jury unless and until further arrangements be made in that connection concerning those words, that in any and all events the exhibit with those words on the exhibit be not submitted to the jury. If the exhibit goes before the jury, the Court requires counsel and the clerk to assist the trial judge in excluding those words from the attention of the jury.

(Plaintiff's Exhibit 26 received in evidence.)

The Court: We have Plaintiff's Exhibit 27 not yet disposed of. It is the letter of May 14th.

Mr. A. L. Maslan: May I return to the stand?

The Court: You may do so. [271]

Direct Examination

(Continued)

By Mr. Ben Maslan:

Q. Will you look at the exhibit? What is the exhibit number?

A. It is a letter from the Department, May 14, wherein they state that they are sending the record to the Seattle office and insisting, however, that if an action is to be brought the amounts in the sum of \$267.50 are to be returned back to the Department of Labor by the prospective plaintiff.

(Testimony of A. L. Maslan.)

Mr. Ben Maslan: We offer that exhibit in evidence, Your Honor.

Mr. Preston: Same objection, immaterial.

The Court: The objection is overruled. That exhibit is now admitted.

(Plaintiff's Exhibit 27 received in evidence.)

Q. Subsequent to the commencement of this action, did you have any communications from the Department of Labor and Industries showing acquiescence or any other action in connection with the action taken by Mr. Haynes in this suit?

Mr. Preston: That would be immaterial, whether the Department acquiesced or otherwise. [272]

The Court: The objection is overruled.

The Witness: I received a letter, which is now being marked as an exhibit.

(2-15-49 Letter marked Plaintiff's Exhibit 30 for identification.)

Mr. Ben Maslan: We offer that in evidence.

Mr. Preston: That exhibit has no bearing here. It is a letter, the first of this year, from the State asking how the case is coming along. What that has to do with election or anything else, I can't imagine.

The Court: Does it say anything about accepting those check payments? Does it have anything to do with adopting or accepting or acceding to the course taken by the plaintiff?

Mr. Ben Maslan: It refers, Your Honor, spe-

(Testimony of A. L. Maslan.)

cifically to the letter of September 16, which told the Department that suit had been commenced against the third party, Pennsylvania Salt Manufacturing Company, and it does not show any objection or anything other than the acquiescence, and I think in that regard it is admissible.

Q. By the way, that check was cashed, was it not? A. Yes. [273]

The Court: The check which is part of Plaintiff's Exhibit 24 is the one you refer to, is it?

Mr. Ben Maslan: Yes, Your Honor, the check dated September 16th or thereabouts.

The Witness: In the sum of \$187.50.

The Court: Look at the check and answer the question, will you?

The Witness: That check was cashed by the Department of Labor and Industries on October 18, 1948.

The Court: Does it bear any other indorsements indicating any other official dealing with it?

The Witness: Yes, Your Honor. It bears the following bank indorsement, "Pay Seattle First National Bank, Olympia Branch, or Order by Russell H. Fluent, State Treasurer of Washington" and it was marked indorsed above that, Department of Labor and Industries. These indorsements appear on the reverse side of said check.

The Court: Do you know what became of the money collected on that check? Will you look at the last indorsement particularly?

(Testimony of A. L. Maslan.)

The Witness: There was an indorsement dated October 18, 1948. It went through the Seattle First National Bank.

Q. Actually, it was cashed and went into the State [274] Treasury by those indorsements?

A. Yes, because the sum of \$187.50 was deducted from our bank account.

Q. By virtue of those indorsements, the State Treasury is the one that cashed that?

A. It was indorsed by Russell H. Fluent, State Treasurer.

The Court: The Court is ready to rule upon Plaintiff's Exhibit 30. Would counsel for defendant state their attitude?

Mr. Preston: We objected to it on the ground it was irrelevant and incompetent.

The Court: The Court thinks it is admissible as being an act by the State Department indicating receipt by that Department of the last communication of the plaintiff, from the plaintiff's counsel which is in evidence as Plaintiff's Exhibit 24.

Mr. Ben Maslan: This language in *Harvey vs. McCormick Lumber Co.*, 149 Wash 368——

The Court: Does it touch upon admissibility?

Mr. Ben Maslan: It touches upon the question of apparent acquiescence in return of money.

The Court: You may read it very briefly.

Mr. Ben Maslan: In *Harvey vs. McCormick Lumber Co.*, 149 Wash 368, at 374: [275]

"... he notified the department of his intention

(Testimony of A. L. Maslan.)

so to do, and made complete restitution to the state of the moneys he had already received, all with the apparent acquiescence and consent of the department." That fits exactly the situation.

The Court: In that case, did the Court hold that the election was sufficiently accomplished by those actions?

Mr. Ben Maslan: Yes, Your Honor.

The Court: The Court is ready to rule. The objection is overruled. Plaintiff's Exhibit 30 is now admitted.

(Plaintiff's Exhibit 30 received in evidence.)

The Witness: I believe His Honor asked me a question in relation to the cashing of this check. I know it was cashed and the said sum was deducted from our bank account.

The Court: I wondered if he could tell by considering the check in its present form, all indorsements thereon, who got the money?

The Witness: Yes, the Treasurer, State of Washington, through the Department of Labor and Industries. [276]

Q. Are there any other communications from yourself to the State following that?

A. Yes. In answer to that letter, which was dated February 15, 1949, which I received either on the 16th or 17th, I sent back a letter to the Department.

Q. Under what date?

(Testimony of A. L. Maslan.)

A. February 17, 1949.

Q. Do you have a copy of it there?

A. I have our office copy.

Q. Could I see that please?

(2-17-48 Letter marked Plaintiff's Exhibit 31 for identification.)

Mr. Ben Maslan: I offer that letter in evidence.

Mr. Preston: It is objected to as immaterial, incompetent, irrelevant, nothing to do with election or anything else in the case.

Mr. Ben Maslan: It shows a continued acquiescence by the State of Washington in the prosecution of the present suit against the Penn. Salt Company.

The Court: Are you going to offer any other letter subsequent to that? Is that the last one?

The Witness: There is one more, Your Honor.

Mr. Preston: What would be the materiality of whether the State agreed or not? [277]

The Court: May I see the other one?

The Witness: That is another request for what is happening, and the answer. That shows the trial was set September 9, 1949.

The Court: Bind these two together and mark them Plaintiff's Exhibit 32.

(7-12-49 Letter marked Plaintiff's Exhibit 32 for identification.)

The Court: Let opposing counsel see them, and also 31.

(Testimony of A. L. Maslan.)

Mr. Preston: I can't see any materiality, if the Court please.

Mr. Ben Maslan: We offer Exhibit 31 for identification and Exhibit 32 for identification.

Mr. Preston: May I continue my objection, please? I know of no requirement the State has to acquiesce in these actions, so how would the continued correspondence back and forth between counsel and the State, advising when the case might be set or when it is expected it will be on the calendar and so forth, how that could have any materiality at all, I don't know.

The Court: It negates the possibility that the Department did not acquiesce in the attempts to revoke [278] the previous actions of the plaintiff, accepting one or more checks, paying him compensation under the Workmen's Compensation Act. It does have, in my opinion, such effect. The objection is overruled and Plaintiff's Exhibits 31 and 32 are admitted.

(Plaintiff's Exhibits 31 and 32 received in evidence.)

The Witness: May I advise Your Honor what they are?

The Court: You may.

The Witness: Exhibit 31 was the answer to Exhibit 30, I believe, which was a letter dated February 15th wherein they ask what the progress of the trial was, and I advised them that in all pos-

(Testimony of A. L. Maslan.)

sibility it will be set on February 23rd for some time in May or June of 1949.

Exhibit 32 is the further request for information from the Department of Labor in a letter dated July 12, 1949, asking us the present status of the Oscar Haynes case, Claim No. B-575312. The letter was dated July 12th and the answer was dated July 14th, wherein I stated *I stated* in the said answer that the above entitled matter—referring to the case of Oscar Haynes vs. Pennsylvania Salt Company—has been set [279] for trial September 9, 1949, before the Federal Court.

The Court: Is this all the evidence you wish to offer on the question of election?

Mr. Ben Maslan: By the way, just for the record, the case was continued from the September date mentioned until the present date.

The Court: You may step down.

Mr. Preston: No questions.

(Witness excused.)

Mr. Ben Maslan: Oscar Haynes, please.

The Court: The witness has already been sworn and will now resume the stand for further interrogation. Try to complete all of the interrogation of this witness at this time.

OSCAR VIRGIL HAYNES

recalled as a witness, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ben Maslan:

Q. Prior to this time that you consulted your attorney, Mr. A. L. Maslan of our firm, did you have any knowledge that you might have a possible claim of suit [280] against the Pennsylvania Salt Company? A. No, sir.

Q. When did you first learn that you had such a possibility of suit?

Mr. Preston: This is all repetition, if the Court please.

Mr. Ben Maslan: I do not know whether that came in or not.

Mr. Preston: It was all gone over time and time again.

The Court: Read the question.

(Last question read by reporter.)

Mr. Ben Maslan: Against the Pennsylvania Salt Manufacturing Company.

The Court: I am going to permit him to answer it, being in the absence of the jury and the possibility that the Court may be called upon to rule as a matter of law upon the question of whether or not election was made before this action was brought.

The Witness: That was in the latter part of April.

(Testimony of Oscar Virgil Haynes.)

Q. When you consulted your attorney, Mr. Maslam? A. Yes, sir.

Mr. Ben Maslan: You may cross-examine.

Mr. Preston: No questions. [281]

The Court: Step down.

(Witness excused.)

The Court: Is there any other evidence on the question of election?

Mr. Ben Maslan: May I ask him just one question from here?

The Court: You may do so.

Mr. Ben Maslan: Did you ever assign your cause of action against the Pennsylvania Salt Manufacturing Company to the Department or to anyone else?

The Witness: No, sir.

The Court: What do you wish to say, if anything, in the absence of the jury with respect to this testimony that has been received on the question of election?

Mr. Ben Maslan: Your Honor, frankly yesterday we had anticipated that the mere fact that we had brought the action and were pursuing it, shall I say, relentlessly or with some vigor was proof enough of election. However, the question was raised. The defendants never raised the question in their answer; however, the Court on its own motion made the suggestion as to that question and in view of that we proceeded with this testimony today. Now, we sincerely feel that the plaintiff

has solely elected to bring himself [282] within the election in favor of this suit against this company.

The Court: What is the allegation in the complaint on that point, if any?

Mr. Ben Maslan: We do not know that any allegation is necessary. If it is, the allegation is included by reason of the testimony that has been introduced. Actually, we feel that it is a matter of defense, if at all.

The Court: There have been a lot of objections to the testimony that has been offered.

Mr. Ben Maslan: There is no objection that there was no pleading. There was direct testimony without objection made by the parties as to the election. This matter came up on cross-examination. It started the question of all these letters and documents and so forth, as Your Honor will recall, which came up on cross-examination of the witness, Oscar Haynes, by the defendant company. But the matter of election, Oscar Haynes' direct testimony was admitted without objection, as I recall.

“* * * Provided, however, that if the injury to a workman is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this Act or seek a remedy against such other, such election to be in advance of any suit under this Section; * * *”

Of course, we have the letter of June corroborating the letter of May to the effect that, as stated

in the letter of May, "We elect to bring action against the third party, the Pennsylvania Salt Manufacturing Company," and suit was brought sometime in September or thereabouts, the filing date of the suit.

The Court: The filing date, September 15, 1948?

Mr. Ben Maslan: Yes, Your Honor. So the actual election, which even counsel stated, was an election on that date of June 8th, was some two months, more than two months prior to the date of the suit.

"* * * and if he take under this Act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; * * *"
In other words, if he is going to go ahead under the Workmen's Compensation Act, it says it is mandatory the cause of action shall be assigned to the Department, which was never done. That would be the election the other way. As a matter of fact, the plaintiff testified positively that he never made any [284] such assignment.

Later on, it says, "Any such cause of action assigned to the state may be prosecuted, or compromised by the Department, in its discretion." So there being no assignment, there is no procedure against the Department, there is no election against the Department.

The Court: Do you ask the Court as a matter of law to so instruct the jury, that there was election before the suit was filed?

Mr. Ben Maslan: Yes, Your Honor.

The Court: Is there anything else you wish to say?

Mr. Ben Maslan: I think the law is pointed out in *Harvey vs. McCormick Lumber Co.* That case was not ruled upon as a matter of law but the Court did lay down the rules of law applicable which I may state to Your Honor. I think there was an issue of fact as to the election. Here there is no issue of fact.

“An election to accept compensation from the state under the provisions of the Statute above quoted requires an assignment of the claim against the third party against whom such right of action exists. No such assignment was made in this case; and conceding that, where an election has actually been made, [285] assignment would follow as a matter of law, yet the state has here consented to and has held respondent’s claim in abeyance and permitted him to return the money received and maintain this action in his own right. Regardless of respondent’s course of conduct, the cause of action here litigated belonged either to respondent or to the state. Appellant was and is answerable either to respondent or to the state. In this particular, our Industrial Insurance Act differs from some we have examined. There can be no election under our law without an assignment, either actual or by operation of law, of the cause of action.”

Then I would like to read another portion of the decision, if Your Honor please.

“Respondent, after making claim for compensa-

tion, received certain moneys from the state. The testimony clearly indicates, however, that, at the time of the receipt of the money, he had no knowledge of his right to pursue any other remedy. He did not comply with that condition of the Statute relative to assigning his claim to the state. Promptly upon learning of his right to sue the appellant, he notified the Department of his intention to do so, and made complete restitution to the state of the moneys he had already received, all with the apparent acquiescence and consent [286] of the department. The question then remains, can a man be said to have elected between two inconsistent remedies if he does not know of the existence of both?" Clearly there is no evidence here, there is no cross-examination of the witness to show that he did know of anything. There is no evidence at all to show that he knew of having any other remedies.

The Court: I will hear from the opposing side.

Mr. Preston: I am not quite sure what question is before the Court.

The Court: I understood the plaintiff has asked that this question, if it ever was one, be withdrawn from the jury and the jury be instructed in connection with the general instructions on final submission of the case to the jury that the plaintiff did elect to sue this defendant in a third party suit instead of proceeding under the Workman's Compensation Act.

Mr. Preston: In other words, whether the Court should rule——

The Court: As a matter of law.

Mr. Preston: —as a matter of law that the election has been made prior to the beginning of the action. May we consider that? This evidence went in without any idea we received as to what its purpose was. [287]

The Court: I want to say to both of you that tentatively the Court inclines to favor granting this request for the Court's ruling on that question as a matter of law and not to submit the question whether or not an election was made for the jury to decide.

Mr. Preston: The Court may be justified, but I would like to consider it.

The Court: I have not announced the Court's decision. I have tried to advise counsel of the trend of the Court's thinking at this time. I am going to excuse all those connected with this case for at least ten minutes. After the Court has a recess, I expect to bring in the jury and proceed in the trial of this case.

For the time being, the Court directs Exhibits 24-32 inclusive be not submitted to the jury but be kept as part of the record made in this case in the absence of the jury.

(Recess.)

The Court: Let the record show all of the jurors are present as before and that all parties on trial with their counsel are present. Call the next witness.

Mr. A. L. Maslan: May it please Your Honor, there is an item of evidence that has been admitted by both counsel, in relation to a doctor's bill in the sum of [288] \$97.00 from Dr. Cameron.

The Court: Do you mean as to that counsel are agreed it may be offered and received in evidence?

Mr. A. L. Maslan: Yes, Your Honor.

Mr. Preston: That is right.

(Doctor's statement marked Plaintiff's Exhibit 33 for identification.)

Mr. Ben Maslan: Just for the record, perhaps I might read that.

The Court: Upon the stipulation stated, the Court does now admit Plaintiff's Exhibit 33 in evidence and you may read it at this time, if you wish.

(Plaintiff's Exhibit 33 received in evidence.)

Mr. A. L. Maslan: This is a statement of Drs. Cameron and Hillis of Tacoma, Washington, for professional services, February, March and April, 1948, in the sum of \$97.50. I don't think there is any question about this being reasonable.

Mr. Ben Maslan: With the exception of the legal matter that we discussed, the plaintiff now rests.

The Court: The plaintiff rests. The defendant may now proceed. If the defendant wishes to make an opening statement, it will now have that opportunity.

Mr. Preston: Your Honor, the defendant will waive an opening statement. I might say to the

Court and counsel our evidence will consist of an offer of proof of various matters which should, by reason of Your Honor's previous ruling, be made in the absence of the jury, so I might suggest that the jury be excused.

The Court: What will be the defendant's further wishes after that?

Mr. Preston: After that the defendant will rest.

The Court: In view of that fact, will there be any rebuttal?

Mr. Ben Maslan: No, Your Honor.

The Court: Is there something you wish to ask, Mr. Bothell?

Juror No. 12: Could I ask a question, Your Honor? Your Honor, there is some jurors here, before this case is turned over to us for our deliberation, who would like to see the plaintiff for a closer examination. I hesitate to ask about it because I didn't know.

The Court: I will say this to the jurors; I will instruct you now the responsibility rests on counsel and the Court in furnishing the jury with all [290] the evidence necessary for them to have in order to make a decision of the case, and I suggest to the jurors that you may content yourself with your reliance upon the fact that counsel in this case present all of the necessary proof in the case which they are advised of in order to enable the jury to be properly advised of the facts.

Mr. Ben Maslan: We would be very pleased to have the plaintiff appear at this time in front of

the jurors for closer inspection. I had intended during my argument to the jury to bring him forward. I do not know whether that is proper or not.

The Court: That is not proper. If there is any evidence to be produced, you should produce it.

Mr. Ben Maslan: At this time I move to reopen just for that purpose, to have the plaintiff appear in front of the jury for their close inspection. I would appreciate that, Your Honor.

The Court: Is there any objection?

Mr. Preston: No.

The Court: That request is granted and the case is opened up for that purpose. No words need be spoken. Just give the jury an opportunity to see the plaintiff. Is there anything else that anyone wishes in this connection? Does the plaintiff rest?

Mr. Ben Maslan: Yes, Your Honor.

The Court: Does the defendant rest, subject to this condition that you mentioned?

Mr. Preston: Subject to the condition I made.

The Court: I wish all members of the jury to carefully remember and heed the Court's previous admonitions against gathering any information about this case in any way other than that which the Court instructs you, namely, while you are present in the Courtroom in open Court in the presence of the Court and the parties and their counsel, and under no other circumstances, and remember all the details of the admonitions and heed them at all times. The jury is excused until

Friday morning at 9:30 o'clock. You may now retire.

(Jury retires.)

The Court: Does the plaintiff wish to show anything or does the defendant wish to show anything respecting plaintiff's motion or request that the Court rule as a matter of law that the plaintiff did effectually before filing this action elect to proceed under the provisions of the Workmen's Compensation Act which permits the plaintiff to elect to sue a third party not his employer on account of his injuries and damages sustained in the accident involved in this [292] action?

Mr. Ben Maslan: We renew our motion or suggestion to the effect that the Court take that question away from the consideration of the jury and rule as a matter of law that there has been such a valid election and that the jury be so instructed, and that they be instructed to disregard all reference to the Workmen's Compensation Law.

The Court: Is there anything else to be said by defendant?

Mr. Preston: We have nothing further to say on it, Your Honor.

The Court: The Court grants the motion and request and will so instruct the jury.

The defendant may make its offer of proof as part of its case-in-chief as previously mentioned.

Mr. Starin: The offer of proof, if the Court please, concerns the matter which is the subject of the legal argument in the session last evening upon

which the Court has indicated its ruling. For the record, the defendant offers to prove by the testimony of Jack Radinsky that he is a member of the firm which employed the plaintiff, Oscar V. Haynes; at the time of the accident and at all times prior thereto while in the employ of B. Radinsky & Son the plaintiff was a workman [293] engaged in extra hazardous employment; that at the time of the accident and for a long period of time prior thereto plaintiff was employed as a truck driver handling heavy loads of scrap metals and other materials; that said employment was classified as extra hazardous under the Workman's Compensation Act of the State of Washington; that B. Radinsky & Son at all times prior to February 20, 1948, reported to the Department of Labor and Industries of the State of Washington that the plaintiff was employed by them in extra hazardous employment; and at all times B. Radinsky & Son, the employer of the plaintiff, paid all contributions required to be paid by it to the Industrial Insurance Fund in the State of Washington covering such extra hazardous employment of the plaintiff.

The defendant further offers to prove by the testimony of J. M. Driskell that he is the treasurer of the Pennsylvania Salt Manufacturing Company of Washington, Incorporated, the defendant in this action, and as such treasurer is in charge of all of the records relating to personnel and to the payment of contributions to the Industrial Insurance Fund of the State of Washington; that at all times

since the establishment of defendant's Tacoma plant, defendant has been engaged in extra hazardous employment; that [294] said plant at all times was operated with the use of power driven machinery and constituted a factory, mill and workshop as those terms are defined by the Statutes of the State of Washington; that all employees engaged in the operation of said plant and employed in the yard and premises adjoining the plant were classified as being engaged in extra hazardous employment as defined by the Workmen's Compensation Act of the State of Washington; that all employees of the defendant, including Edwin L. Cliffe, assistant superintendent in charge of production and plant personnel, who participated in any manner in the handling, removing, cleaning or storing of the coil of pipe alleged to have caused plaintiff's injury and who were required to perform any duties whatsoever with respect thereto, and whose actions or omissions with reference to said coil of pipe are said to have formed the basis of plaintiff's charge of negligence, were employees who were classified as extra hazardous under the Workmen's Compensation Act of the State of Washington.

That all of said employees at all times prior thereto, including and subsequent to the date of the delivery of said coil of pipe to Frank Powser, were classified under 37—1, defined by the Statutes of the State of Washington as being extra hazardous employment, [295] that at all times the defendant made contributions to the Industrial Insurance

Fund covering all of said employees, which contributions were computed according to the rates fixed for such classified employment, and at no time was defendant in default in the payment of said contributions.

That, if the Court please, is our offer of proof.

The Court: What is the attitude of the plaintiff respecting the allegations in Paragraph 2 on Page 3 of the defendant's answer and first affirmative defense, or any part of the allegations contained in that paragraph insofar as the same may be affected by this offer of proof?

Mr. Ben Maslan: Your Honor, we move to strike. We move to strike this portion of the pleading, and I believe Your Honor sustained it yesterday. I don't know whether I am phrasing it correctly, but we object to this proffered testimony as not constituting any defense to this action and being therefore incompetent, irrelevant and immaterial, redundant and so forth. Was there some other purport to your question?

The Court: About being a contributor to the fund.

Mr. Ben Maslan: That is entirely immaterial, Your Honor, if Your Honor abides by Your Honor's ruling of yesterday it is entirely immaterial as to whether [296] they were or were not a contributor. I understood that the Court will——

The Court: I heard the offer. Is there anything you have to observe in connection with your statement concerning it as to whether or not it offers

any material that is new and different from that which was considered yesterday?

Mr. Ben Maslan: I can't see any difference there, Your Honor. He offers to prove, in effect, that the plaintiff was a workman under the Industrial Insurance Law. There is no question about that. Then he offers the background proof to the effect that the company at all times was engaged in extra hazardous employment, and so forth, but nowhere does he get away from the logic of Your Honor's ruling of yesterday evening. In other words, as my associate counsel who argued the matter yesterday suggested to me, the evidence that he offers at this time by this formal offer of proof is nothing more or less than the evidence that would be introduced under these allegations of the affirmative defense if it were allowed to stand. Without such an affirmative defense such evidence is improper, it is incompetent. It isn't relevant at all to any of the issues in the case. In other words, it does not state a defense. That is the whole essence of my position. [297]

The Court: Is it your contention it does not go far enough? To prove that with respect to this particular pipe and at the time of the accident with reference to that pipe it was in the course of those extra hazardous operations?

Mr. Ben Maslan: That is correct, that it was part of the defendant's operations, and the evidence is very clear—it is admitted, as a matter of fact, by the defendants themselves that the pipe had

been discarded and abandoned some appreciable time prior to the time of the accident, which occurred on someone else's premises entirely.

The Court: The Court feels sufficiently advised, but does counsel for defendant wish to make any further observation?

Mr. Starin: Not other than was made, Your Honor. We only want to call Your Honor's attention to the last question which counsel commented upon. There is evidence in the case now by the testimony of Mr. Cliffe and the testimony of Mr. Driskell, I believe, that the pipe in question was not discarded until Mr. Cliffe had directed it to be sold. I simply wanted to call that particular evidence to the Court's attention. That wasn't included in the offer of proof.

The Court: The Court is of the opinion that that does not make it material, that notwithstanding that we assume the convincing power claimed for that evidence, that there is a difference in the testimony as to when the pipe was disconnected from service of defendant in its extra hazardous occupation, that nevertheless for an appreciable length of time before this accident happened such disconnection became effective, and there is no evidence in the case which tends to support any claim or contention which might be advanced that as a matter of fact the pipe was still in service of the defendant in its extra hazardous industrial operations. The court does sustain the objection to the offer of proof, and to each and all of them.

Mr. Preston: We rest, Your Honor.

The Court: Before the Court accepts the final resting of the parties, I wish to call attention to the fact that Plaintiff's Exhibit 20 was not offered and it is not in evidence. It is the doctor's bill of Dr. Read.

Mr. A. L. Maslan: I believe it was agreed upon, was it not, counsel?

Mr. Preston: There was some communication at the bottom of it. I think I objected for that reason.

Mr. A. L. Maslan: The testimony of the doctor was [299] in the record that it was \$113.00. This exhibit may remain out.

The Court: Do you wish to withdraw it and have it returned to counsel who produced it?

Mr. Ben Maslan: We might just as well withdraw it and not encumber the record.

The Court: It is withdrawn and will now be returned to plaintiff's counsel.

Mr. A. L. Maslan: Do I understand there was a statement that that was the amount the doctor requested?

The Court: I think the doctor made some such testimony, although at first he did not recall he had sent a bill nor how much it contained. I think counsel's questions afterwards elicited from the witness substantially the same information which is now contained in the exhibit. Does anyone else think of anything? I believe counsel for defendant should in the presence of the jury, after the jury returns to the courtroom Friday morning, announce

that the defendant does rest, if that is your attitude.

Mr. Preston: Yes. We had already stated we would rest in the presence of the jury after this offer. If the Court wants me to say it again, I will.

The Court: If you do not say it, I wish you would remind me to do so. I would like for the jury to be [300] finally, officially told the taking of the testimony is completed.

Is there any reason why the Court should not be adjourned until Friday morning at 9:30? I will excuse counsel in the case until 8:30 Friday morning for the purpose of discussing instructions, but Court will be adjourned until 9:30 Friday morning. All those connected with this case may now be excused.

(At 4:30 o'clock, p.m., Wednesday, November 23, 1949, proceedings adjourned until 9:30 o'clock, a.m., Friday, November 25, 1949.)

Seattle, Washington; November 25, 1949,
11:00 o'Clock, A.M.

The Court: For the information of all those present, I wish to say that the delay in the Court's opening this morning has been occasioned by the application of a certain rule of Court which requires the trial judge to discuss with counsel in the case on trial before a jury the requested instructions and the [301] Court's intended instructions.

Let the record show all of the jurors are present

in the case on trial, and likewise all parties on trial with their counsel, and that all of these persons are now present.

Does defendant rest?

Mr. Preston: Yes, Your Honor.

The Court: Is there any rebuttal?

Mr. Ben Maslan: No, Your Honor. Plaintiff rests at this time.

(Arguments made by counsel for plaintiff and defendant.)

The Court: This case is still not finally submitted to the jury, and you will reserve your discussions until later and also reserve your decision until later. The Court will after the lunch hour instruct you as to the law and will thereafter finally submit the case to the jury for its deliberation and verdict. You are now excused for the lunch hour, subject to the Court's previous admonitions.

Court is recessed until 1:00 o'clock.

(At 12:10 o'clock, p.m., Friday, November 25, 1949, proceedings recessed until 1:00 o'clock, p.m., Friday, November 25, 1949.) [302]

Seattle, Washington; November 25, 1949,
1:00 o'Clock, P.M.

The Court: Let the record show that all of the jurors are present and all parties on trial with their counsel are present.

It now remains for the Court to instruct you as

to the law governing the case and for the Court to thereafter finally submit the case to the jury for its deliberation and verdict.

COURT'S INSTRUCTIONS

Members of the Jury: You have heard the testimony and the arguments of counsel. After the Court instructs you, you will retire to the jury room to consider your verdict.

This is an action to recover damages for possible injuries which plaintiff alleges he sustained as a result of the negligence of the defendant in the respects stated in the complaint of the plaintiff. Plaintiff further alleges that he is a citizen of this state and that the defendant is a corporation organized under the laws of the state of Delaware and as such is a citizen [303] of the state of Delaware; that the defendant is qualified to do business in the state of Washington; that the plaintiff is an individual and also a citizen of the United States as well as the state of Washington, and these things just mentioned are all admitted by the defendant and no further proof or consideration need be given to those allegations in the plaintiff's complaint because of such admissions.

It might be interesting to the jury for me to make an aside statement that I had not intended to make, and that is that in this Court in this kind of a case the only way this Court could have jurisdiction to try it is because, first, it involves citizens of different states. That is what they call the

ground of diversity of citizenship. Second, it involves an amount claimed to be involved of more than \$3000 exclusive of interest and costs. Were it not for those two things, this Court would not have jurisdiction to try this case. It would have to have been brought and maintained in the State Court, but under federal law where any cause of action arises between citizens of different states, the Federal Court may under certain conditions have jurisdiction of that even though the cause of action does not, as it does not in this case, involve any federal law question. [304]

The plaintiff further alleges in his complaint that early in February, 1948, and for some years prior thereto the defendant was in the business of manufacturing chemicals and that it maintained and operated a manufacturing plant in Tacoma, Washington, where it produced and processed chemicals; that in the manufacturing and processing of those chemicals in that plant the defendant handled many chemicals capable of causing burns and severe injuries to persons who might come in contact with the chemicals; that in its plant it used a great number of iron pipes of various types and sizes through which defendant ran various types of chemicals in the processing and manufacturing of chemicals; that as the said pipe became worn, they were discarded as a part of the defendant's manufacturing plant and were replaced with other pipes; that during February, 1948, the defendant sold certain scrap iron to Frank Powser of Tacoma; that in-

cluded among that scrap iron was a large coil of pipe which the defendant had discarded from its manufacturing plant; that during February, 1948, employees of the said Frank Powser went to the defendant's Tacoma plant to accept delivery of that scrap iron sold to Frank Powser; that an employee of the defendant delivered the scrap iron which had been sold to Frank Powser, including the coil of pipe, to the [305] employees of Frank Powser who then loaded the scrap iron, including the coil of pipe, onto a truck which they had brought for that purpose and transported it to the salvage yard of Frank Powser in Tacoma; that upon arrival at that salvage yard of Frank Powser the coil of pipe was deposited in the Powser yard; that the coil of pipe at the time it was delivered to the employees of Powser contained sulphuric acid; that neither Powser nor any of his employees knew that the coil of pipe contained hidden within it sulphuric acid; that on the 20th day of February, 1948, the plaintiff was employed as a truck driver by B. Radinsky & Son, salvage dealers of Seattle; that on that day the plaintiff was directed by his employer to proceed to the salvage yard of Frank Powser in Tacoma to pick up a load of scrap iron and scrap pipe; that the plaintiff in a truck owned by his employer did proceed to the salvage yard of Frank Powser as directed and after arriving there was shown by employees of Frank Powser the scrap iron and scrap pipe which plaintiff was to load on his truck and transport to his employer's yard in Seattle;

that among the scrap iron to be loaded was the coil of pipe in question here; that the coil of pipe was laying on the ground in the salvage yard of Powser and in the same position as it had been when [306] first deposited in the Powser yard by Powser's employees at the time they had transported it from defendant's manufacturing plant; that plaintiff was at all times unaware that the coil of pipe contained the acid; that by means of a hoist the plaintiff loaded the coil of scrap pipe from the ground onto the truck; that for the purpose of placing the coil of pipe in a proper position on the truck and in order to move it a few inches, the plaintiff, using a maul, pounded on the pipe, when, without warning or notice to the plaintiff, a seam in the pipe opened and a pressurized stream of sulphuric acid which was in the pipe issued from it and struck the plaintiff on the face, arms, neck and eyes and covered a large portion of his clothing; that the force with which the acid spewed from the coil of pipe knocked the plaintiff from the truck to the ground; that the plaintiff suffered injuries as a result; that plaintiff was immediately rushed to the Tacoma General Hospital in Tacoma where he was forced to remain for 58 days.

Plaintiff further alleges that his injuries were caused by and were the direct and proximate result of the negligence of the defendant in that (a) the defendant failed to ascertain all sulphuric acid injurious to other persons on contact had been removed [307] from the coil of pipe before allowing

the coil of pipe to be removed from the premises of the defendant to be placed as scrap metal into the stream of commerce where it was certain to be handled by other persons unaware of its dangerous qualities; (b) that defendant failed to remove the sulphuric acid from the coil of pipe immediately after removing the pipe from its operating system; (c) that the defendant sold and delivered the coil of pipe containing the sulphuric acid, which is highly injurious to other persons upon contact, without having warned the persons to whom the pipe was sold and delivered of the presence of sulphuric acid in the coil of pipe.

The plaintiff further alleges that the sulphuric acid which issued from the coil of pipe as before alleged, upon coming into contact with his eyes, burned them to such an extent that he has suffered complete loss of vision in the left eye and almost total loss of vision in the right eye; that upon coming into contact with the rest of plaintiff's person, the sulphuric acid caused severe burns which have resulted in multiple scars, disfiguring the greater portion of plaintiff's face and neck and portions of his arms; that the injuries to the plaintiff have caused and are still causing and will cause in the future to the plaintiff excruciating pain [308] and extreme mental anguish and suffering; that the scars on plaintiff's face and body are extremely tender and continue to reopen, causing him continuous pain; that the plaintiff has been receiving medical treatment since the injuries and it will be

necessary for him to receive medical treatment in the future; that prior to the injuries sustained by the plaintiff as a result of defendant's negligence, the plaintiff was a strong and able bodied man in good health, with excellent vision, earning and capable of earning the sum of \$300 per month; that as a result of the injuries plaintiff sustained he has become totally and permanently disabled and disfigured; that the plaintiff will be permanently incapacitated and that his ability to follow any occupation has been permanently destroyed; that he has suffered intense pain and mental anguish in the past and will continue to so suffer in the future; that the plaintiff has been forced to expend large sums for medical and hospital services; that he is still being treated by doctors for his injuries and that he will be forced to expend large sums in the future for medical and hospital costs.

The defendant has denied all of the foregoing allegations of the plaintiff except as previously noted and except also that the defendant has admitted and does [309] admit the following allegations mentioned among the foregoing allegations in plaintiff's complaint, namely:

That defendant maintained and operated a manufacturing plant in Tacoma and that in the operation of that plant it used iron pipes; that as said pipes became worn they were discarded and replaced; that during February, 1948, the defendant sold scrap iron from its Tacoma plant, including a large coil of pipe which defendant had discarded

from its operating system; that the defendant delivered the scrap iron, including the coil of pipe, to employees of Frank Powser at the plant of defendant; that the plaintiff was employed in the capacity of truck driver by B. Radinsky & Son, salvage dealers of Seattle, Washington; and that on or about February 20, 1948, plaintiff was directed by his employer to pick up a load of scrap iron and scrap pipe in the salvage yard of Frank Powser in Tacoma; that the plaintiff proceeded to the salvage yard of Frank Powser in a truck owned by his employer; and that while in the act of loading this coil of scrap pipe which had been acquired by Frank Powser from the defendant, the plaintiff suffered injuries.

The plaintiff has the burden of proving all of the allegations of his complaint which are denied by the defendant by a fair preponderance of the evidence, as [310] I shall afterwards in these instructions define that term.

In addition to denying the certain allegations of the plaintiff previously mentioned as being denied, the defendant alleges as an affirmative defense that any injuries which may have been sustained by the plaintiff as a result of handling the coil of pipe were directly and proximately contributed to by plaintiff's own negligence. This allegation, in effect, of contributory negligence on plaintiff's part is denied by the plaintiff, and that denial of plaintiff of such affirmative allegation places upon the defendant the burden of proving that affirmative

defense by a fair preponderance of the evidence.

This is a civil case, and the party alleging in his pleadings any material fact which is not admitted by the opposing party has the burden of proof to establish such fact, which must be done by a fair preponderance of the evidence.

The basis of this action is negligence. The plaintiff is not entitled to recover merely because there was an accident. In order to recover, the plaintiff must prove by a fair preponderance of the evidence that the defendant was negligent in one or more particulars, as alleged in plaintiff's complaint, [311] and that plaintiff sustained injuries and damages as alleged and that such negligence was the proximate cause of such injuries and damages.

"Negligence" is the failure to exercise reasonable and ordinary care. By the term "reasonable and ordinary care" is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances and conditions. "Negligence" consists in the doing of some act which a reasonably prudent person would not do under the same or similar circumstances, or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances and conditions. Negligence is not to be presumed, but must be established by proof the same as any other fact in the case.

The term "proximate cause" means an efficient

cause of an injury or loss without which such injury or loss would not have been sustained. It is that cause which in direct, unbroken sequence produces or directly contributes to producing the injury or loss complained of, and without which cause the injury or loss would not have occurred.

By the term "burden of proof" is meant the obligation to prove or establish a fact by a preponderance [312] of the evidence.

By the term "preponderance of the evidence" or "fair preponderance of the evidence" is meant that evidence on a particular matter which, when fully, fairly and impartially considered by you, has the greater weight with you, produces a stronger impression and is more convincing to you as to its truth than that to which it is opposed; and such preponderance of the evidence is not necessarily determined by the greater number of witnesses who may have testified for the one party or the other regarding such matter, since you may take into consideration all of the evidence in the case, no matter by which side produced.

The burden of proof in this case is on the plaintiff to prove all the material allegations in his complaint which are not admitted by defendant; and the burden of proof is on the defendant to prove the affirmative defense of his answer which is denied by plaintiff.

The defendant charges that the plaintiff was guilty of contributory negligence. "Contributory negligence" means negligence or want of care on

the part of a person suffering injury or damage, which materially and proximately contributed to cause the injuries complained of. It also may consist in doing some act [313] which a reasonably prudent person would not have done under the same or similar circumstances or conditions, or in failing to do something which a reasonably prudent person would have done under the same or similar circumstances. It is never presumed, but must be established by proof when, as in this case, it is denied. The burden of such proof in this case is on defendant.

The plaintiff is not required to prove each separate charge of negligence alleged in his complaint, but it will be sufficient to support recovery by him if plaintiff proves by a preponderance of the evidence and you find the defendant guilty of any one of such acts of negligence and that the same proximately resulted in injury and damage to the plaintiff as alleged by him.

You are instructed that while the party alleging any fact not admitted by the opposing party has the burden of establishing such fact by a preponderance of the evidence, it is not essential that it be established by evidence introduced by the party having such burden of proof, but it may be established in whole or in part by evidence introduced by the opposite party.

You are instructed that under the evidence in this case, the plaintiff has legally elected to bring an [314] action against the defendant Pennsylvania

Salt Manufacturing Company of Washington, a Delaware corporation. You are therefore instructed to disregard entirely any evidence as to or mention of the Workmen's Compensation Act or any rights the plaintiff may have thereunder.

One who has in his possession or under his control a force or substance dangerous in character is bound to take precautions consistent with the danger to prevent an injury being done thereby. The law exacts of one who puts a dangerous force in motion or abroad that he shall control it with a skill and care proportioned to the danger created. A higher degree of care and vigilance is required in dealing with a dangerous agency than in dealing with non-dangerous agencies in the ordinary affairs of life or business which involve little or no risk of injury to persons or property. While no absolute standard of care applicable to all cases in dealing with such dangerous agencies can be prescribed, yet every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken in each specific case.

If, therefore, you find from a preponderance of the evidence in this case that the coil of pipe sold by defendant contained a substance dangerous to the tissues of the human body and that defendant knew or by the exercise of reasonable and ordinary care should have known of the presence thereof, but failed to take precautions consistent with the danger to prevent injury to others, then in that event the defendant would be guilty of negligence

and defendant would be liable for any injuries and damages sustained by plaintiff as a proximate result of such negligence, unless you find plaintiff was guilty of negligence proximately contributing to the complained of occurrence and the resulting injuries to plaintiff.

You are instructed that if you find from a preponderance of the evidence in this case that the plaintiff at the times in question did not use reasonable care for his own protection and well being, and that such failure on his part directly and proximately contributed to cause the complained of occurrence and plaintiff's resulting injuries, then plaintiff cannot recover and your verdict in that event should be for the defendant, regardless of whether or not the defendant was also negligent.

Respecting foreseeability as bearing upon defendant's liability, in this case, the law is that defendant is liable for the natural, probable and foreseeable effects of defendant's negligence, and only for those. If the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence without an intervening efficient cause from the original negligent act are natural and proximate; and for such consequences the original wrong doer is re-

sponsible, even though he could not have foreseen the particular result which did follow.

The defendant corporation can act only through its agents and employees and is responsible for the acts and omissions of such agents and employees within the scope of their authority. If defendant's agents or employees had knowledge or in the exercise of reasonable and ordinary care should have had knowledge of the presence of a dangerous substance in the coil of pipe in question, then in contemplation of law the defendant knew or should have known of such fact.

If you find from a preponderance of the evidence that the proximate cause of plaintiff's injuries was solely the negligence of plaintiff himself, then your verdict must be in favor of the defendant. [317]

If you believe, after full consideration of all of the facts and circumstances as disclosed by the evidence in this case, that what happened was a mere accident, which was under all the circumstances unavoidable and was not proximately caused by negligence, if any, on the part of the defendant, then there can be no recovery in this action and your verdict must in that event be for the defendant.

The plaintiff, in order to prevail in this action, must prove by a preponderance of the evidence or reasonable inference there from that defendant was negligent in one or more of the particulars charged in plaintiff's complaint. If in order to find an act of negligence on the part of defendant

you are required to resort to speculation, surmise or conjecture, then plaintiff cannot recover, and in that event your verdict should be for the defendant.

You are instructed that if you find from the evidence that at the time of the delivery of the coil of pipe to employees of Frank Powser, the employees of the defendant did not know or by the exercise of reasonable and ordinary care would not have known of the existence of any dangerous or injurious substance contained in that pipe, then your verdict should be for the defendant.

If you find for the plaintiff, you will assess his damages in such an amount as will fully and fairly compensate him for his injuries, for such impairment of his vitality or faculties, if any, as he has suffered in the past or is reasonably certain to suffer in the future, for such loss of earnings, if any, as he has sustained in the past or is reasonably certain to sustain in the future, for such pain and suffering and mental anguish, if any, as he has endured in the past or is reasonably certain to endure in the future, and for such expenses, if any, as he has reasonably and necessarily incurred in the past and will so incur in the future for the services of doctors, hospitals and medical care, but in no event shall your verdict exceed the total aggregate sum of \$250,000.

In assessing the compensation to be paid, if any, for alleged future pain and suffering and mental anguish or for future loss of earnings or for the

future impairment of physical vitality or faculties, I instruct you that you cannot indulge in speculation or uncertainties, but may award damages only for such matters as are reasonably certain to happen in the future as disclosed by the evidence.

The purpose of the law is not to punish the defendant, in case you find it liable, but to fairly and fully compensate the plaintiff. The law has not furnished us with any fixed standard by which to measure pain and suffering, mental anguish or the impairment of one's physical vitality or faculties, nor by which to measure the compensation to be paid for such things. With reference to these matters, you must be guided by your own experience and judgment based upon the evidence in the case.

Evidence has been admitted regarding the normal life expectancy of a man of Oscar Haynes' age and the cost of purchasing certain annuities. This evidence was not admitted as a basis for a mathematical computation of damages, but was offered and admitted solely to assist you, when considered with all the evidence in the case, in calculating the plaintiff's damages in the event you should find a verdict in his favor. The normal life expectancy of a man of the age of 23 years is 43.88 years. The fact that a man of the age of 23 years might normally be expected to live 43.88 years is not to be accepted as proof that Oscar Haynes will live that length of time or would be able to pursue his vocation as a truck driver or any other vocation for that length of time. Neither is it to be

accepted as proof that he would have died at the expiration of that time. The mortality tables from which this life expectancy data was taken have been compiled by life insurance companies from a study of statistics affecting their own policy holders. This data is all based upon the assumption that the man is an insurable risk in good health. In determining the probable life expectancy of Oscar Haynes or the number of years that he would probably have been able to pursue his occupation, you must consider all of the evidence in the case bearing upon the condition of his health, his habits of life, the nature of his occupation and all other circumstances disclosed by the evidence which may seem to you to have a bearing upon the probable duration of his useful working life.

The fact that the Court has instructed you upon the rules governing the measure of damages in this case is not to be taken by you as an indication on the part of the Court that it believes or does not believe that the plaintiff is or is not entitled to recover damages in this case. Such instruction is given to guide you in arriving at the amount of your verdict only in the event that you find from the evidence and under the instructions given you by the Court that the plaintiff is entitled to recover damages. If from the evidence and under the instructions given you by the Court, you find that the plaintiff is not entitled to recover, then you are to entirely disregard the instructions which have been given you concerning the measure of damages.

You are the sole and exclusive judges of the evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness, you have a right to consider his demeanor upon the witness stand, the apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the results of the trial, and any other fact or circumstance arising from the evidence which appeals to your judgment as in any wise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.

You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely, except insofar as the same may be corroborated by other credible evidence in the case.

Plaintiff having testified as a witness, the foregoing relating to credibility of witnesses and weight of testimony applies to him and his testimony, as well as to all the other witnesses in the case.

It is the duty of the Court to instruct you as to the law governing the case, and you must take such instructions to be the law. You will consider such instructions as a whole and will not select any one

of them and place undue emphasis on that one instruction.

You will consider all evidence admitted by the Court and now before you, and you will disregard all evidence and exhibits offered but not admitted by the Court and all evidence stricken by the Court.

In this connection, you are instructed that you are not called upon to pass upon objections and exceptions made or taken by counsel and you should not allow the making of objections and taking of exceptions by counsel to influence or confuse you.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issue upon the merits and to arrive at your conclusion without any consideration of the financial ability of the one or the necessities of the other, and without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

You shall not permit sympathy or prejudice in favor of or against either party or their respective attorneys to have any place in your deliberations, for all persons are equal before the law and all are entitled to exact justice.

Statements, if any, by counsel or the Court unsupported by your own recollection of the evidence, you will disregard.

While it would be proper for me as the trial judge to analyze the testimony and to give you my understanding of it, which, however, would not be

binding upon you, my purpose is not to intimate to you any opinion I may have of any fact or the weight of any evidence, and if I refer to or have referred to any facts in the case, it will not be and has not been for the purpose of indicating any opinion I may have of the facts, but simply to illustrate some proposition of law which is involved with the facts.

If you can conscientiously do so, you are expected to agree on a verdict in this case. The matter being submitted to you for your consideration is an important and serious one, as are all cases submitted to juries. You should bring to your consideration of this case your earnest and honest endeavor to solve it justly and properly with due regard to the rights of both the plaintiff and the defendant.

Let me say to you that you should freely consult with one another in the jury room. If any one of you should be convinced that your view of the case is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper to adhere to your own view, if, after a full exchange of ideas, you still believe you are right.

You must not in arriving at the amount of your verdict resort to the so-called pooling plan or scheme. Such scheme is for each juror to write down the amount he thinks should be awarded, then to add up those amounts and divide that sum by 12 and thus fix the amount of your verdict. Do not do that as that would be illegal, for your ver-

dict should be based upon the evidence and the law as given to you by the Court, and not upon such or any method of chance determination of your verdict.

I might add this further thought to the jurors by way of an explanation of the present stage of the trial. Counsel in the case on both sides have brought before the Court and jury all of the admissible evidence that they know of to properly enable the jury and the Court to perform their respective functions. The Court has fully instructed the jury on the law applicable to the case. It is not known to the attorneys or the trial judge what more could be done to properly enable the jury to perform its duty. You now have all of the means necessary to a decision.

In this Court, the instructions in written form are not sent to the jury room. Likewise, written transcripts of the oral testimony from the witness stand are not sent to the jury room. It is for the jury to remember the evidence and the Court's instructions.

Immediately upon your retiring, you will select one of your number as your foreman. The pleadings in the case will not be sent to the jury room as the issues are simple and have been sufficiently explained to you in the arguments of counsel, in the evidence and in the Court's instructions and by other means during the course of the trial. You will take with you to the jury room the exhibits in the case, and you will be given two forms of

verdicts, one for the plaintiff and one for the defendant. These forms have been prepared by the clerk of the Court for your convenience.

When you reach your verdict, if the same is for the plaintiff, you will in that event fill in the proper form of verdict the amount of recovery you allow the plaintiff and have your foreman sign that verdict. In that connection, you will see from the verdict form the place left blank for you to fill in in case you use that form of verdict. I suggest that you write down the information to be put in those blank places on a separate piece of paper and see that you get it accurately written down on a separate piece of paper, in case you find it necessary to use this form of verdict by reason of the verdict which you have found, and then transfer from that trial sheet of paper the accurate figures into the verdict form, and then you will thereby insure against mistake and erasures. That has been said only in case your verdict as found requires you to use the verdict form which has on it the filling in of such blank spaces.

If you find for defendant, you will use the appropriate form provided therefore and have your foreman sign that verdict. You will discard the form of verdict not used.

It is necessary that all of you agree on your verdict, and when so agreed upon, you will cause your foreman to sign your verdict and return with it into open court.

Counsel, have I overlooked anything?

If there are any exceptions to be noted by coun-

sel, I shall, upon being so advised, temporarily excuse the jury for that purpose as the rules provide. Are there any exceptions to be so noted?

Mr. Preston: Yes, we have one, Your Honor.

The Court: The rules provide that counsel may do this in the absence of the jury, and the law places upon counsel the duty of doing it in that manner, so at this immediate time when the jury is excused from the jury box, which you are about to be, you will give no further thought to this case. During this recess, refrain from discussing it among yourselves. Reserve your decision entirely until after you have been brought back to the courtroom and until after the Court has finally submitted the case to the jury for its deliberation and verdict. The case has not yet been so submitted. Do not begin your deliberations and do not begin your discussions of the case. The jury will now temporarily retire.

(Jury retires.)

The Court: Does the plaintiff have any exceptions which the plaintiff wishes to note?

Mr. Ben Maslan: Yes, Your Honor. We except to the failure of the Court to give plaintiff's proposed instruction No. 2, which reads as follows: "You are instructed that the injuries of the plaintiff Oscar Haynes occasioned by sulphuric acid on or about February 20, 1948, while loading a coil of pipe discarded from the plant of the defendant Pennsylvania Salt Company, were caused by the negligence of the defendant, and it is your duty

to bring in a verdict in favor of the plaintiff Oscar Haynes against the defendant company for the damages he sustained on account of such injuries.”

In effect, Your Honor, that instruction calls for a directed verdict on the legal portion of the cause, namely, that the Court should find as a matter of law that the defendant company was negligent and leave to the determination of the jury solely the question of the damages for the injuries. Our position in that respect is that we have clearly, without any contradiction and without any reasonable minds, legally speaking, being able to differ on the subject, established the negligence of the defendant in that contrary to well established law they sold and put into the stream of commerce this inherently dangerous object, knowing or reasonably having to know that someone might be injured thereby. We feel that the matter should not have been submitted to the jury but that the Court as a matter of law should have told the jury that the defendant was negligent.

The Court: That exception is allowed.

Mr. Ben Maslan: Your Honor, we except to the Court's failure to give what has been denominated in the plaintiff's proposed instructions as Instruction No. 11, which reads as follows: “You are instructed that if you find that the defendant sold the coil of pipe to Frank Powser and knew or should have known that it contained sulphuric acid and that defendant could reasonably have antici-

pated that someone unaware of the pipe's dangerous condition would be burned by the acid, and that defendant delivered the pipe to Frank Powser without giving notice of the pipe's dangerous qualities, then you must find that the defendant was guilty of negligence. And if you find that the plaintiff was injured as a proximate result of that negligence, your verdict must be for the plaintiff."

Neither that nor anything that covers the question of failure of giving notice as an element of negligence was given by the Court, and that is a clear statement of the law in that regard, and the jury should have been instructed either exactly this way, or some other instruction incorporating this failure to give notice as negligence should have been given.

The Court: Allowed.

Mr. Ben Maslan: I would like Mr. Hanan to phrase the other exception that we have. He is a little more familiar with the particular legal point involved.

Mr. Hanan: I think it is denominated Instruction No. 8 in defendant's requested instructions, Your Honor. I believe Your Honor gave it in substance in these terms, that you are instructed that if you find from the evidence that at the time of delivery of the coil of pipe to employees of Frank Powser, the employees of the defendant did not know or in the exercise of reasonable and ordinary care could not know of the existence of any dangerous or injurious substance, then your verdict should be for the defendant.

We except to that portion of the instruction which read, "in the exercise of reasonable and ordinary care could not know," for this reason; we feel that the instruction should have read, in the exercise of reasonable care. Under the circumstances, inasmuch as following the said phrase there was reference to a dangerous and injurious substance, we feel that the use of the words "ordinary care" is in contradiction, or perhaps not in exact contradiction, but it casts a doubt as to the exact standard of care necessary when handling injurious substances, and we feel that the use of the words "ordinary care" negatives any ideas the jury might get that in handling any dangerous substance, that reasonable care under the circumstances amounts to greater care than is ordinarily given to substances which are not dangerous. I think that is the sum and substance of our objection to that instruction.

A second objection we have to that instruction is this, we feel that under the evidence there is no doubt, reasonable minds cannot differ on the fact that the employees of the defendant knew or should have known of the existence of that sulphuric acid in that pipe; therefore, there being no question but what they should have known what it was, and to leave that point in doubt in the minds of the jury and allow them to pass upon it——

The Court: Allowed. Is that all the exceptions to be noted by the plaintiff?

Mr. Ben Maslan: That is correct, Your Honor.

The Court: Defendant may now note its exceptions.

Mr. Preston: Your Honor, the defendant excepts to the refusal of the Court to give its requested Instruction No. 1, which is simply a peremptory instruction to the jury that they return a verdict to the Court in favor of the defendant on the ground and for the reason that under the evidence in the case it appears without question that the plaintiff has no common law cause of action, or action permitted by Statute, but is restricted in his remedy to the Workman's Compensation Act of the State of Washington.

The Court: Allowed. Bring in the jury.

All of the jurors have returned to their places as before.

The clerk will now swear the bailiffs.

(Bailiffs sworn.)

The Court: What I am about to say will apply only to the 12 principal jurors and will not apply to the alternate juror. The Court instructs the jury that you will now retire to consider your verdict, being hereafter in the conduct of the bailiffs, and you will hereafter remain together at all times until discharged by the Court from further consideration of this case. The case is now fully and finally submitted to the jury for its deliberations and verdict. You will now retire.

(Jury retires.)

(At 2:15 o'clock p.m., Friday, November 25, 1949, trial proceedings concluded.)

CERTIFICATE

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,
Official Court Reporter.

[Endorsed]: Filed March 9, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF U. S. DISTRICT COURT TO RECORD ON APPEAL.

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Sub-division 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75 (o) of the Federal Rules of Civil Procedure and designation of counsel, I am transmitting herewith all of the original pleadings on file and of record in said cause in my office at Seattle, as set forth below, and that said pleadings, together with Plaintiff's Exhibits Num-

bered 1 to 19 inclusive, 21, and 23 to 33 inclusive, offered in evidence at the trial of said cause constitute the record on appeal from the Judgment for Plaintiff filed and entered December 12, 1949, to the United States Court of Appeals for the Ninth Circuit, to wit:

1. Complaint.
2. Marshal's Return on Summons.
3. Stipulation re Contents of Pipe.
4. Appearance of Attorneys for Defendant.
5. Answer of Defendant.
6. Marshal's Return on Subpoena (Hubbard).
7. Praecipe for Subpoena, Powser & Radinsky & Son.
8. Plaintiff's Requested Instructions.
9. Defendant's Requested Instructions.
10. Marshal's Return on Subpoena Powser.
11. Marshal's Return on Subpeona Radinsky & Son.
12. Plaintiff's Memorandum Brief.
13. Defendant's Trial Brief.
14. Marshal's Return on Subpoena Miller & 6.
15. Marshal's Return on Subpoena Cliffe & 1.
16. Verdict for Plaintiff.
17. Plaintiff's Memo of Costs & Disbursements.
18. Notice of Taxation of Costs.
19. Motion for New Trial of One Issue.
20. Notice of Presentation of Judgment.

21. Judgment on Jury Verdict.

22. Notice of Appeal to the U. S. Court of Appeals.

23. Bond on Appeal.

24. Order Enlarging Time to File Transcript of Record on Appeal.

25. Reporter's Transcript of Proceedings at Trial.

26. Praecipe and Designation for Record.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 9th day of March, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12499. United States Court of Appeals for the Ninth Circuit. Pennsylvania Salt Mfg. Co., of Washington, a Corporation, Appellant, vs. Oscar Virgil Haynes, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 11, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit
No. 12499

OSCAR VIRGIL HAYNES,

Respondent,

vs.

PENNSYLVANIA SALT MFG. CO. of Washing-
ton, a Delaware corporation,
Appellant.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Comes now the appellant and pursuant to Rule 19 (6) of the rules of the above entitled court does hereby set forth the point on which it intends to rely on the appeal as follows, to wit:

1. The District Court erred in its ruling that respondent had a cause of action against appellant notwithstanding the provisions of § 7675 Rem. Rev. Stat. of Washington, upon the ground that under said statute the only remedy available to respondent was against the Workmen's Compensation Fund of the State of Washington, said ruling being the basis of (a) the District Court's sustaining of respondent's objection to appellant's offer of proof of facts in support of its first affirmative defense;

(b) the District Court's refusal to peremptorily instruct a verdict for appellant, and (c) the District Court's denial of appellant's motion for a new trial of the issue raised by appellant's first affirmative defense.

PRESTON, THORGRIMSON &
HOROWITZ,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 13, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD

Comes now appellant and pursuant to Rule 19 (b) of the rules of the above entitled court, hereby designates the following as all of the record which is material to the consideration of the appeal:

1. Respondent's complaint.
2. Appellant's answer.
3. Transcript of proceedings at trial.
4. Exhibits introduced at trial.
5. Appellant's requested instructions.
6. Court's instructions.
7. Verdict of jury.
8. Appellant's motion for new trial of one issue.

9. Order overruling appellant's said motion for new trial of one issue.

10. Judgment.

11. Notice of appeal.

12. Appeal bond.

13. Order extending time to file transcript and docketing of cause.

PRESTON, THORGRIMSON &
HOROWITZ,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 13, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL
PARTS OF RECORD

Comes now respondent and hereby designates the following additional parts of the record as being material to the consideration of the appeal:

Stipulation Allowing Amendment to Complaint.

MASLAN, MASLAN & HANAN,
Attorneys for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed March 17, 1950.

In The United States Court of Appeals
For the Ninth Circuit

PENNSYLVANIA SALT MFG. Co., of Washington, a corporation, <i>Appellant</i> , vs. OSCAR VIRGIL HAYNES, <i>Appellee</i> .	}	No. 12499
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APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF OF APPELLANT

FRANK M. PRESTON,
PRESTON, THORGRIMSON & HOROWITZ,
Attorneys for Appellant.

2000 Northern Life Tower,
Seattle 1, Washington.

In The United States Court of Appeals
For the Ninth Circuit

PENNSYLVANIA SALT MFG. Co., of Washington, a corporation, <i>Appellant</i> , vs. OSCAR VIRGIL HAYNES,	} No. 12499 <i>Appellee.</i>

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF OF APPELLANT

FRANK M. PRESTON,
PRESTON, THORGRIMSON & HOROWITZ,
Attorneys for Appellant.

2000 Northern Life Tower,
Seattle 1, Washington.

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In The United States Court of Appeals
For the Ninth Circuit

PENNSYLVANIA SALT MFG. Co., of Washington, a corporation, <i>Appellant</i> , <div style="text-align: center;">vs.</div> OSCAR VIRGIL HAYNES,	} } }	No. 12499 <i>Appellee.</i>
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APPEAL FROM THE UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON, NORTHERN
 DIVISION

BRIEF OF APPELLANT

I. STATEMENT OF JURISDICTION

On September 15, 1948, the Appellee Oscar Virgil Haynes filed his complaint in the District Court of the United States for the Western District of Washington, Northern Division, No. 2096 (R. 2-8) wherein he sought to recover the sum of \$250,000 for personal injuries alleged to have been caused by the negligence of the appellant Pennsylvania Salt Mfg. Co., Inc.

It is alleged in paragraph 1 of said complaint that the appellant is a Delaware Corporation and as such is a citizen of the State of Delaware; that it has qualified to do business in the State of Washington, and that it has a resident agent in Seattle, Washington (R. 3). It is alleged in paragraph II of the complaint that the appellee is a resident of Seattle, Washington. It is alleged in paragraph 3 of the complaint that the appellant at all times mentioned in the complaint has

maintained a manufacturing plant at Tacoma, Washington (R. 3). Although the complaint contains no reference to statutes conferring jurisdiction of the cause upon the District Court of the United States for the Western District of Washington, Northern Division, it is presumed that such jurisdiction was conferred by the provisions of the United States Code, Title 28, Section 41(1), Judicial Code Section 24, 28 U.S.C.A. Sec. 1332.

The jurisdiction of this court to review the judgment of the district court is conferred by the provisions of U. S. Code, Section 225, Judicial Code, Section 128, U.S.C.A. (1949 Ed.) Section 1291.

II. STATEMENT OF THE CASE

(a) Pleadings.

The complaint (R. 2-8) in addition to the jurisdictional allegations, sets forth that the appellant is engaged in the operation of a manufacturing plant wherein it manufactures and processes chemicals (R. 3). That in the operation of said plant it uses iron pipes containing various types of chemicals in the manufacturing and processing of chemicals; that in February, 1948, the appellant sold certain scrap iron to one Frank Powser. Included among such scrap iron was a coil of pipe which the said Frank Powser received at the plant of the appellant and transported to his salvage yard in Tacoma, Washington; that on February 20, 1948, the appellee Haynes was employed as a truck driver by B. Radinsky & Son, salvage dealers, of Seattle, Washington (R. 4). That upon said date he was directed to proceed to Frank Powser's

salvage yard to pick up a load of scrap iron and scrap pipe, among which was the coil of pipe referred to above (R. 5). That said coil of pipe was loaded onto the truck which was driven by appellee Haynes, and that in order to place the coil in the proper position on the truck the appellee proceeded to pound it with a maul whereupon a pressurized stream of a corrosive substance issued from the pipe and struck the appellee on the face, arms, neck and eyes (R. 5, 6); that by reason of the corrosive chemical substance issuing from the coil of pipe, coming into contact with the appellee's eyes, the appellee suffered a complete loss of vision in the left eye and almost total loss of vision of the right eye; that he also sustained severe burns upon his face and neck.

Paragraph VII of the complaint (R. 7) is as follows:

“That the said negligence of the defendant consisted of the following:

“a. Failing to ascertain that all corrosives and substances injurious to other persons upon contact had been removed from said coil of pipe or neutralized before allowing said coil of pipe to be removed from the premises of the defendant to be placed as scrap metal into the stream of commerce where it was certain to be handled by other persons unaware of its dangerous propensities.

“b. Failing to remove all corrosives and substances injurious to humans from said coil of pipe immediately upon removing said coil of pipe from its operating system.

“c. Selling and delivering a coil of pipe containing a corrosive substance highly injurious to other persons upon contact, without having

warned the persons to whom the said pipe was sold and delivered, of the presence of dangerous substances in said coil of pipe.”

The complaint further sets forth that the appellee was, prior to his injuries, a strong, able-bodied man, capable of earning the sum of \$300 per month and that as a result of his injuries he has sustained damages in the sum of \$250,000 (R. 7, 8).

The appellant's answer admitted the jurisdictional allegations, admitted the operation of the plant, and the use of coils of pipe within its plant; admitted the sale of the coil of pipe to Frank Powser, admitted the employment of the plaintiff in the capacity of a truck driver by B. Radinsky & Son; admitted that the plaintiff had driven a truck to the salvage yard of Frank Powser for the purpose of picking up a load of scrap including the said coil of pipe, and further admitted that while in the act of loading the pipe the plaintiff sustained injuries. The other allegations of the complaint were denied, and the allegations of paragraph 7 of the complaint relative to the alleged negligence of the appellant were specifically denied.

The appellant's answer further contained the following affirmative defense:

I.

“That at all times mentioned in the plaintiff's complaint herein the plaintiff was a workman engaged in extra hazardous employment as the said term is defined in Remington's Revised Statutes of Washington, Section 7675, and that the injuries sustained by the plaintiff, if any such injuries were sustained, were sustained while the

plaintiff was engaged as a workman in such extra hazardous employment.

II.

“That at all times mentioned in the plaintiff’s complaint the defendant was an employer of workmen engaged in extra hazardous employment as defined under the aforementioned statute, and at the time of the accident which was alleged to have occurred as set forth in plaintiff’s complaint the defendant as such employer was engaged in extra hazardous employment as defined by said Act, and at all such times the defendant, as such an employer, was a contributor to the Workmen’s Compensation Fund.

III.

“That the purported negligent act or omission which is alleged by the plaintiff to have been the proximate cause of the plaintiff’s alleged injuries was directly connected with extra hazardous employment and business then being carried on by the defendant as an employer, and that at said time the employer was a contributor to the Workmen’s Compensation Fund of the State of Washington, under the terms and provisions of the statutes of the State of Washington relating to workmen’s compensation and industrial insurance. (Rem Rev. Stat. §7675.)”

The appellant’s answer further alleged that the injuries of the plaintiff were directly and proximately contributed to by the appellee’s own negligence and carelessness.

(b) The Evidence.

There was no substantial controversy as to the manner in which the accident occurred, nor was there

any substantial controversy that the appellee's vision has been impaired. It should be pointed out, however, that the evidence is clear that there has been a substantial improvement in appellee's vision (R. 125) and that such improvement can be expected to continue (R. 126); that there is a possibility, with successful surgery, that vision might be restored to within 5% or 10% of normal (R. 127). The evidence is further clear that even without surgery there is a possibility that the appellee's vision will improve so that he will have, with glasses, 20-60 to a 20-70 vision, which is adequate for many types of industrial employments (R. 129).

In support of the allegations of its first affirmative answer, the appellant made the following offer of proof (R. 274-277):

"The offer of proof, if the Court please, concerns the matter which is the subject of the legal argument in the session last evening upon which the Court has indicated its ruling. For the record, the defendant offers to prove by the testimony of Jack Radinsky that he is a member of the firm which employed the plaintiff, Oscar V. Haynes; at the time of the accident and at all times prior thereto while in the employ of B. Radinsky & Son the plaintiff was a workman engaged in extra hazardous employment; that at the time of the accident and for a long period of time prior thereto plaintiff was employed as a truck driver handling heavy loads of scrap metals and other materials; that said employment was classified as extra hazardous under the Workman's Compensation Act of the State of Washington; that B. Radinsky & Son at all times prior to February

20, 1948, reported to the Department of Labor and Industries of the State of Washington that the plaintiff was employed by them in extra hazardous employment; and at all times B. Radinsky & Son, the employer of the plaintiff, paid all contributions required to be paid by it to the Industrial Insurance Fund in the State of Washington covering such extra hazardous employment of the plaintiff.

“The defendant further offers to prove by the testimony of J. M. Driskell that he is the treasurer of the Pennsylvania Salt Manufacturing Company of Washington, Incorporated, the defendant in this action, and as such treasurer is in charge of all of the records relating to personnel and to the payment of contributions to the Industrial Insurance Fund of the State of Washington; that at all times since the establishment of defendant’s Tacoma plant, defendant has been engaged in extra hazardous employment; that said plant at all times was operated with the use of power driven machinery and constituted a factory, mill and workshop as those terms are defined by the Statutes of the State of Washington; that all employees engaged in the operation of said plant and employed in the yard and premises adjoining the plant were classified as being engaged in extra hazardous employment as defined by the Workmen’s Compensation Act of the State of Washington; that all employees of the defendant, including Edwin L. Cliffe, assistant superintendent in charge of production and plant personnel, who participated in any manner in the handling, removing, cleaning or storing of the coil of pipe alleged to have caused plaintiff’s injury and who were required to perform any duties whatsoever with respect thereto,

and whose actions or omissions with reference to said coil of pipe are said to have formed the basis of plaintiff's charge of negligence, were employees who were classified as extra hazardous under the Workmen's Compensation Act of the State of Washington.

"That all of said employees at all times prior thereto, including and subsequent to the date of the delivery of said coil of pipe to Frank Powser, were classified under 37-1, defined by the Statutes of the State of Washington as being extra hazardous employment; that at all times the defendant made contributions to the Industrial Insurance Fund covering all of said employees, which contributions were computed according to the rates fixed for such classified employment, and at no time was defendant in default in the payment of said contributions."

The evidence is also undisputed that the coil of pipe which was involved in the accident had been retained by the appellant as a spare piece of equipment available for use in the event that it became necessary (R. 148-150); that it had not been discarded or abandoned as part of the plant equipment until the day that the decision was made to sell it (R. 148).

(c) The Verdict

The case was submitted to the jury solely upon the issue of the appellant's alleged negligence and the appellee's injuries. The jury returned a verdict in favor of appellee in the sum of \$35,000.

(d) The Question Involved.

The sole question presented to this court for review is the question of law involving the right of the ap-

pellee to maintain the action against the appellant, that is, whether or not the appellee as a workman covered by the Workmen's Compensation Laws of the State of Washington is limited and confined to a claim for benefits under that law, and that he has no right to maintain any action against the appellant, which was an employer covered by the same law, engaged in extra hazardous employment at the time of the accident.

III. SPECIFICATIONS OF ERROR

1. The district court erred in sustaining the appellee's objection to the appellant's offer of proof of facts in support of its first affirmative defense; the appellant's offer is set forth on pages 274-277 of the record. The ruling of the court sustaining the appellee's objection to the offer of proof is set forth on page 279 of the record (Cf. R. 173-177).

2. The district court erred in refusing to give the following instruction requested by appellant:

"You are instructed to return a verdict into court in favor of the defendant." (R. 15)

3. The district court erred in its ruling denying plaintiff's motion for a new trial of the issue raised by the defendant's first affirmative defense, to-wit: that the appellee had no right to maintain this action under Section 7675 of Remington's Revised Statutes of Washington (R. 19).

IV. ARGUMENT

Inasmuch as each of the appellant's specifications of error relate to the same question of law, they will be discussed herein together.

(1) Summary Statement of the Appellant's Position:

The appellee did not have the right to maintain this action in that, (a) under the statutes of the State of Washington a workman does not have any common law right to maintain an action to recover damages for injuries received during the course of extra hazardous employment; (b) that the only right which a workman so engaged has to maintain such an action is a statutory right, and that, therefore, the exercise of such right is expressly defined by the statute; (c) That under the express provision of the Washington statute the appellant, as an employer engaged in extra hazardous employment who had made all required contributions to the Industrial Insurance Fund, was granted immunity from action by any workman engaged in extra hazardous employment where the basis of such action was the negligence of appellant's workmen similarly engaged.

(2) The Statutes Involved.

Remington's Revised Statutes of the State of Washington, Sec. 7673, provides as follows:

"Declaration of police power. The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable.

The welfare of the state depends upon its industries, and even more upon the welfare of its wage workers. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra-hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Remington's Revised Statutes of Washington, Sec. 7674, provides, in part, as follows:

"There is a hazard in all employment, but certain employments come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term 'extrahazardous' wherever used in this act, to-wit: * * *."

A full enumeration of the works and occupations regarded as extrahazardous follows, specifically including factories, mills and workshops where machinery is used, engineering works, power plants.¹

¹See Appendix p. 35 for full text of Rev. Rem. Stat., Sec. 7674.

Remington's Revised Statutes of the State of Washington, Section 7675, provides, in part, as follows:

"In the sense of this act words employed mean as here stated, to-wit:

"Factories mean undertakings in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and plant of the concern, except when otherwise expressly stated.

"Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control, except when otherwise expressly stated.

"Mill means any plant, premises, room or place wherein machinery is used, any process of machinery, changing, altering or repairing any article or commodity for sale or otherwise, together with the yards and premises which are a part of the plant, including elevators, warehouses and bunkers, except when otherwise expressly stated.

"Mines mean any mine where coal, clay, ore, mineral, gypsum or rock is dug or mined and underground.

"Quarry means an open cut from which coal is mined, or clay, ore, mineral, gypsum, sand, gravel or rock is cut or taken for manufacturing, building or construction purposes.

“Engineering work means any work of construction, improvement or alteration or repair of buildings, structures, streets, highways, sewers, street railways, railroads, logging roads, inter-urban railroads, harbors, docks, canals, electric, steam or water power plants, telegraph and telephone plants and lines, electric light or power lines, and includes any other works for the construction, alteration or repair of which machinery driven by mechanical power is used, except when otherwise expressly stated.

“Except when otherwise expressly stated, employer means any person, body of persons, corporate or otherwise, and the legal personal representatives of a deceased employer, all while engaged in this state in any extrahazardous work, by way of trade or business, or who contracts with one or more workmen, the essence of which is the personal labor of such workman or workmen, is extrahazardous work.”

Remington's Revised Statutes of Washington, Section 7675, further provides in part as follows:

“Workman means every person in this state, who is engaged in the employment of any employer coming under this act whether by way of manual labor or otherwise, in the course of his employment: Provided, however, that if the injury to a workman is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to

the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case: *Provided, however, that no action may be brought against any employer or any workman under this act as a third person if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under this act.*" (Emphasis ours)

(3) Discussion of Authorities.

A proper interpretation of the last quoted portion of Remington's Revised Statutes of Washington, Section 7675, and particularly the portion thereof which has been italicized as above, is determinative of the issue involved in this case.

The statute as quoted has been in effect since 1929. As originally enacted the Industrial Insurance Act of the State of Washington (Laws of 1911, Ch. 74, Sec. 3, p. 346) provided that if a workman while away from the plant of his employer sustained injuries through the negligence of one not in the same employ, he could elect to take under the act or sue the person causing his injuries. Under the original enactment it made no difference that the tort feisor was an employee engaged in extrahazardous employment. Under that original enactment if a workman sustained injuries even though engaged in extrahazardous employment, at some place other than the plant of his employer, he had a right to sue the tort feisor even

though that tortfeasor was an employer or workman engaged in extrahazardous employment.

The workman's right to maintain such an action was preserved subject to the limitation mentioned in the original act until 1927. Under the provisions of the Laws of 1927 Chapter 310, Sec. 2, p. 815, a workman was given the right to elect to claim benefits under the Industrial Insurance Act or to sue a third party tortfeasor without the limitation that the injury be sustained away from the plant of his employer. Under the 1927 Act, therefore, if one who was not in the same employ negligently injured a workman, he was liable in an action for damages if the injured workman elected to proceed against him irrespective of the place where the injury occurred.

However, the unlimited right of election given by the 1927 Act was changed by the amendment thereof in 1929 (Laws of 1929, Ch. 132, p. 325, Sec. 1, which is the law at the present time (R.R.S. Sec. 7675) *supra*). As stated by the Washington Supreme Court in the case of *Koreski v. Seattle Hardware Company*, 17 Wn.(2d) 421, 135 P.(2d) 860, p. 428:

"The Workmen's Compensation Act affords a right of action to certain workmen for personal injuries sustained under certain circumstances, and withhold the right of action from him in other situations *depending upon the status of the person whose negligence causes the injuries.*"

The original industrial insurance act of the State of Washington (Laws of 1911, Ch. 74, p. 345) was first considered by the Washington Supreme Court in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash.

156, 117 Pac. 1101, wherein the court held that the act was founded upon the basic principle that certain defined industries designated in the Act as extra-hazardous should be made to bear the financial losses sustained by workmen engaged therein through personal injuries; that the purpose of the act was to furnish a remedy which would reach every injury sustained by a workman engaged in any such industry and make a sure and certain award therefor, bearing the full proportion to the loss sustained regardless of the manner in which the injury was received.

In the case of *Stertz v. Industrial Ins. Commission*, 91 Wash. 588, 158 Pac. 256, the court said:

“Ours is not an employer’s liability act. It is not even an ordinary compensation act. It is an industrial insurance statute. Its administrative body is entitled the industrial insurance commission. All the features of an insurance act are present.”

In the case of *Boeing Aircraft Co. v. Department of Labor & Industries*, 22 Wn.(2d) 423, 156 P.(2d) 640, the question before the court was whether or not one of two industries should be charged with the costs of a particular accident. An airplane owned and operated by the Boeing Aircraft Company while on a trial flight crashed into the meat packing plant of Frye & Co. of Seattle, killing and injuring many employees of the meat packing plant as well as killing the members of the crew. Both the Boeing Company and Frye & Company were contributors to the industrial insurance fund, the aircraft company being contributor under Class 34-3 and Frye & Co. a contribu-

tor under Class 43-1. Inasmuch as under the Act the premium rates for industrial insurance were based upon loss experience in each defined industry, it became necessary to determine whether the amount of the loss paid should be charged to the airplane industry or to the meat packing industry. The court held that each class was liable for the costs and losses sustained in their respective classes, and that the Department of Labor & Industries was not authorized to transfer the charges for death and injuries suffered by the employees of the meat packing plant from the meat packing class to the airplane manufacturing class.

In an extensive and well considered opinion the court reviewed the purpose, policy, and history of the industrial insurance system of the State of Washington, and expressed certain well defined and well accepted rules.

On page 434 of the Reports (22 Wn.(2d)) the court says:

“As stated above, prior to 1927, an employee injured at his employer’s plant had no right of action against any third person. From 1927 to 1929, the employee covered by the act, if injured either away from or at the plant, could elect to take under the statute or sue a negligent third party. Since 1929 an injured employee could sue a negligent third person only if such person was not an employee or employer under the coverage of the statute. * * *

“In 1929 the privilege was withdrawn as to other workmen and the employers likewise under the statute. Industry acquired, under the 1929

statute, an immunity from common-law actions with potentially larger damage claims in exchange for its assumption, in the aggregate, of limited responsibility to its employees without fault.”

Again on page 435 the court states as follows:

“Under the workmen’s compensation act, all civil cases of action for personal injuries sustained in an industrial accident arising out of extrahazardous employment are abolished except in those cases where the act expressly preserves or creates a right of action; and in such cases the rights of action are purely statutory, and not common-law rights. *An employer who complies with the terms of the workmen’s compensation act is entitled to all of its benefits, including immunity from liability for negligently injuring the employee of another employer. A workman, under the workmen’s compensation act at the time he was injured through the negligence of an employee of another company, may not maintain an action against the company the negligence of whose employee or employees caused the injuries, where that company had complied with the provisions of the act which affords immunity from suit in such circumstances.*” (Citing *Koreski v. Seattle Hardware Co.*, *supra*) (Emphasis ours)

It is submitted that the existing statute is intended to afford immunity to an employer engaged in extrahazardous employment where the injury results from the negligence of his employee during the course of such extrahazardous employment, where the employer has complied with the provisions of the industrial insurance act. As stated by the court in *Boeing Aircraft Company* case, *supra*, the immunity afforded by the

1929 statute is in exchange for the assumption by employers in the aggregate of responsibility to employees. It is further clear that the Washington workmen's compensation law is and always has been an insurance law and as modified by the 1929 enactment is designed to afford insurance both to employers and employees against the losses attendant by injuries received by employees during the course of extrahazardous employment.

The proviso of the 1929 amendment, that is, "Provided, however, that no action may be brought against any employer or any workman under this Act as a third person if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under this act," has been discussed and analyzed in the following decisions of the Washington Supreme Court:

Robinson v. McHugh, 158 Wash. 157, 291 Pac. 330.

That case was one where an employee of the city of Tacoma, working in the Light Department, was injured, and elected to sue the respondents as the tortfeasor. The accident occurred on the 19th day of April, 1929, but the action was not commenced until subsequent to the effective date of the statute (Rem. Rev. Stat. 7675) as amended by the Laws of 1929, which included the above proviso, to the effect that no action may be brought against any employer or any workman under the Act if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under the Act. It appeared that the defendants were contributing to the Workmen's Compensation fund and at the time of the

injury were engaged in an extrahazardous occupation. The defendant contended that the amendment had no application because the injury had occurred prior to the effective date of the Act and that the plaintiff's rights were covered by the Workmen's Compensation Act as it existed at the time of the injury. The court in holding that the 1929 amendment applied to all actions brought after its effective date held that the right of action existed only by virtue of the statute, that there could be no vested right therein, and that the Legislature might take away the right at any time. The court concluded that the defendants being employers engaged in extrahazardous employment at the time of the injury, were exempted from liability under the provisions of the 1929 amendment of the Workmen's Compensation Act.

The case of *Denning v. Quist*, 160 Wash. 681, 296 Pac. 145, was one where the court followed the rule of the case of *Robinson v. McHugh*, *supra*, and held that the right of a workman injured by the negligence or wrong of another not in the same employ, to elect whether to take under the Workmen's Compensation Act, or seek a remedy against such other or his employer, as given by the 1927 amendment to Rem. Rev. Stat. Sec. 7675, did not re-establish the common law remedy abolished by the Workmen's Compensation Act. The court went on to say:

"This amendment, however, did not re-establish in favor of the injured workman any common law right but simply enlarged his existing statutory right. This right being purely statutory, it was competent for the legislature to limit the same, as was accomplished by the 1929 amend-

ment, *supra*, and we are satisfied that the correct rule was laid down by this court in the case of *Robinson v. McHugh, supra*."

In the case of *O'Brien v. Northern Pac. R.R. Co.*, 192 Wash. 55, 72 P.(2d) 602, the plaintiff sustained injury as the result of a collision of a truck which he was operating with a train operated by the defendant. The plaintiff was entitled to compensation under the Industrial Insurance Act, but elected to sue the defendant for damages alleging that the collision was caused by the negligent operation of the train which at the time was engaged in interstate commerce. The defendant urged that by reason of the proviso of Rem. Rev. Stat. Sec. 7675 it was immune from an action for negligence by the plaintiff who was an employee of another engaged in extrahazardous employment. The court held against the defendant's contention but solely upon the ground that being engaged in the operation of an interstate railroad, it did not contribute to the Workmen's Compensation fund nor was it amenable to the provisions of the Workmen's Compensation Act with respect to its interstate operations. The court states the rule as follows:

"Construing the above quoted proviso of Rem. Rev. Stat. §7675, in the light of the industrial insurance act as a whole, we think a workman, engaged in extrahazardous employment, is not precluded from maintaining an action for negligence against one not his employer, *unless such a one is amenable to the act and a contributor to the 'accident fund.'* Our conclusion finds support, at least by implication, in the decisions of this court in the cases of *Robinson v. McHugh*, 158 Wash. 157, 291 Pac. 330, and *Denning v.*

Quist, 160 Wash. 631, 296 Pac. 145. In each case the defendant (a third person employer) was held immune from suit under the proviso of Rem. Rev. Stat., §7675. But in each opinion the fact is stressed that the defendant was a contributor to the 'accident fund'." (Emphasis ours)

Weiffenbach v. Seattle, 193 Wash. 528, 76 P.(2d) 589.

The plaintiff sued the City of Seattle to recover damages on account of injuries sustained while engaged in measuring the roof of a building; he came in contact with a current of electricity passing through a metal tape measure which he was using; the electricity came from a high voltage wire which was part of the city's light and power system. It was alleged that the city was negligent in that it had permitted its wire to sag down over the roof in contravention of its own regulations which provide that the high voltage wires should clear a building by six feet.

The city defended upon the ground that under the proviso of Rem. Rev. Stat. Sec. 7675, it was engaged in extrahazardous employment under the Workmen's Compensation Act and was, therefore, immune from suit by the plaintiff who was himself engaged in extrahazardous work; the plaintiff contending that the city was not such an employer because the phrase "in the course of any extrahazardous employment" necessarily implies the presence of an employee doing some act at the time and place of the accident, together with an active participation on his part in the doing of some act; that a merely passive negligence, being a nondelegable act or condition on the part of an em-

ployer, such as he contends is found in this case does not afford a basis for the exemption. The court overruled the plaintiff's contention and held that the city in the maintenance of its high voltage wire was actively engaged in an extrahazardous employment at the time of the accident; *that the city was required to and did pay into the industrial insurance fund assessments levied upon its payroll as its ratable contribution for the protection not only of its employees but of the whole body of employees in the state engaged in extrahazardous industry*, and that while no workman of the city was engaged in work on the high voltage line at the time and place of the accident, it was assumed that the city had workmen and others engaged in the maintenance and repair of its extensive distributing system and that some of them were always engaged somewhere on the system.

In its opinion the court explains the theory of the 1929 Proviso in the following language:

"The immunity from a suit here involved must have been granted by the 1929 legislature as a reciprocal compensation to industry for the burden it assumes as an aggregate unit in providing, in the language of the statute, ' * * sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents * * * regardless of questions of fault * * *'." (Emphasis ours)*

In the case of *Pryor v. Safeway Stores, Inc.*, 196 Wash. 382, 83 P.(2d) 241, the court again recognizes the rule but held that the third party employer was not exempt under the proviso of Rem. Rev. Stat. §7675

where such third party employer was not engaged in extrahazardous employment but had brought itself under the Act by the elective adoption provisions of Rem. Rev. Stat. Sec. 7696.

In the case of *Reeder v. Crewes*, 199 Wash. 40, 90 P.(2d) 267, the court held that the immunity afforded by the proviso of Rem. Rev. Stat. Sec. 7675 would not apply to a third party employer who was in default in the payroll reports and in the payment of premiums required under the Act even though such third party employer was engaged in extrahazardous employment.

In the case of *Gephart v. Stout*, 11 Wn.(2d) 184, 118 P.(2d) 801, the plaintiff sought to recover damages for personal injuries sustained through a collision between a motorcycle which he was riding and an automobile owned and operated by the defendant. The plaintiff's injuries occurred while the plaintiff was in the course of his employment which was extrahazardous; the defendant defended upon the ground that he was the owner of an automobile freight transportation business which was concededly classified as extrahazardous; that he had paid premiums to the Department of Labor and Industries on the basis of his reported payrolls although he did not carry himself on such payrolls for employee benefits. There was nothing in the record to indicate that the defendant was doing anything in connection with the operation of his motor freight business at the time of the collision. He was driving a five passenger sedan automobile and the only evidence was that he was on his way to the Carpenters' Union Hall at the time of the accident. The court held that the defendant

was not in the course of any extrahazardous employment at the time of the accident and was therefore not entitled to the immunity afforded by the proviso of Rem. Rev. Stat. Sec. 7675. The court reviews the *Pryor* case and its other decisions including the cases cited in this brief, and then states the rule which we submit is clearly applicable and decisive of the case at bar; the court says:

“While the foregoing cases are not directly in point, they do clearly establish two essential requirements which an employer must meet to entitle him to immunity from suit by a workman not in his employ; (1) the employer must be a contributor to the workmen’s compensation fund; and (2) *at the time of the accident, the employer must be in the course of some extrahazardous employment under the industrial insurance act. To satisfy the second requirement, the negligent act or omission which is the basis of the workman’s cause of action must arise out of, or be in some way connected with, an extrahazardous employment or business then being carried on by the employer.*” (Latter emphasis ours)

In the case of *Koreski v. Seattle Hardware Company*, 17 Wn.(2d) 421, 135 P.(2d) 860, the court directly applied the statute and held that the right of a workman injured by the negligence of another not in the same employ, to elect whether to take under the Act or sue the person causing the injury, was limited by the laws of 1929, p. 325, Section 1, which provided that no such action may be brought against any employer or workman if at the time of the accident such employer or workman was in the course of extrahazardous employment. In that case the plaintiff

who was the president and general manager of an electric motor service company was injured while personally employed in repairing a power driven machine then being operated in the plant of the defendant. The injury was caused by the defendant being swept off of the catwalk of a crane and hurled to a warehouse floor by coming into contact with a girder which was being passed by the crane. The court held that the proviso to Rem. Rev. Stat. Sec. 7675 was clearly applicable, the court reviewing the cases, including the cases cited in this brief, and held as follows:

“Those who comply with the terms and conditions of the workmen’s compensation act are entitled to all the benefits of the act and subject to all of the liabilities of the act. As appellant complied with the terms of the workmen’s compensation act, immunity from liability for negligently injuring respondent, who was the employee of another employer, is a benefit to which appellant is entitled under the act.”

It cannot be disputed that the facts set forth in appellant’s offer of proof (R. 274-277) are that the appellant was engaged in the operation of a factory, workshop and mill within the definition of Remington’s Revised Statutes of Washington, Sec. 7674 and 7675.

It is also indisputable that the removal, handling, sale and transportation of the coil of pipe which is alleged to have been the instrumentality causing the appellee’s injuries was a part of the operation of the factory, workshop, mill and the yards and premises which were a part thereof, as conducted by the appellant in its plant at Tacoma, Washington. There is

no question but that under said offer of proof the appellee was a workman engaged in extrahazardous employment and that the appellee was entitled, and still is entitled, to receive compensation from the industrial insurance fund of the State of Washington. There is no question but that under the offer of proof the appellant was a contributor to the industrial insurance fund of the State of Washington, and that all the employees of the defendant who participated in any manner in the handling, removal, cleaning, storing, sale or delivery of the coil of pipe were engaged in extrahazardous employment as defined by the Workmen's Compensation Act of the State of Washington, and that the appellant had made contributions to the industrial insurance fund covering all of said employees which contributions were computed according to the rates fixed for the employment classification of each of such employees.

Under these facts it is submitted that the test defined in the opinion of the court in the case of *Gephart v. Stout*, 11 Wn.(2d) 184, 118 P.(2d) 801, *supra*, is clearly applicable; (1) the appellant was a contributor to the workmen's compensation fund; (2) at the time of the accident the appellant was in the course of extrahazardous employment under the industrial insurance act in that the negligent act or omission which formed the basis of appellee's cause of action certainly was connected with the extrahazardous employment carried on by the appellant.

The latter proposition is conclusively established by the appellee's allegations of negligence. These allega-

tions which are completely set forth on page 7 of the record and heretofore in this brief consist of:

1. Failing to ascertain that the corrosive substances had been removed from the coil of pipe prior to its removal from the premises of the appellant.

2. Failing to remove all corrosive and injurious substances from said coil of pipe immediately upon removing the coil of pipe from the appellant's operating system.

3. Selling and delivering the coil of pipe without having warned of the presence of dangerous substances in the coil of pipe.

It is axiomatic that a corporation such as the appellant acts only through its employees. Under the appellant's offer of proof the only employees who had or would have had anything whatsoever to do with, (1) ascertaining whether the corrosive substances had been removed from the coil prior to its sale; or (2) whose duty it was to remove such corrosives, or (3) who sold or delivered the coil without warning of the presence of such substances, are all employees who were engaged in extrahazardous employment, who were classified as such upon the records of the appellant and the Department of Labor and Industries of the State of Washington, and for whom contributions had been made by the appellant to the industrial insurance fund upon the basis of such extrahazardous classification.

It is submitted that the language of the 1929 amendment to Remington's Revised Statutes of Washington, Section 7675, definitely provides that where

the injury to a workman engaged in extrahazardous employment is caused by the negligence occurring during the course of extrahazardous employment by another employer or his workmen, *the latter employer is afforded immunity* from claims by the injured workman and that the latter rights are confined to the benefit afforded by the workmen's compensation law.

The whole argument of the appellee in the District Court, and the decision of the District Court upon this issue of law as indicated on pages 173-175 of the record, are based upon the proposition that the offending coil of pipe at the time of the accident had been disconnected from the appellant's operating plant and had been discarded. Even though the evidence is clear that the particular coil of pipe had not been discarded until the decision of Mr. Cliffe to sell it (R. 148-150) the appellee's argument in the trial court, and the trial court's decision is based obviously upon an erroneous theory which is not sustained by any of the decisions of the Washington Supreme Court and which is contrary to them. The decision of the District Court apparently is based upon the dicta contained in the case of *Weiffenbach v. Seattle*, 183 Wash. 528, 76 P.(2d) 589, *supra*, to the effect that if the city had abandoned the use of the wire for the transmission of electricity so that it was no longer performing any function as a part of its operating system, it would then be no longer a part of the industry or the extrahazardous employment in which the city was then engaged.

It is submitted that even if this dicta had any force as a precedent, the situation which it contemplates is

entirely different from that of the case at bar. The situation contemplated by the dicta is one wherein the negligence which would form the basis for an action would consist of the maintenance of a dangerous condition by the city which would be wholly divorced from any extrahazardous industrial operation in which it might then be engaged. The situation contemplated by the dicta would be the equivalent of the city permitting an obstruction or an unprotected ditch to remain in a city street. Surely it could not be said in such a case that there would be any connection between the city's negligence and any extrahazardous industrial operation in which the city might be engaged. *In the case at bar, the situation is entirely different; the negligence which is the basis for the appellee's claim was negligence which occurred during the course of appellant's operation of an extrahazardous industrial plant.* In the instant case the appellee's claim is not based upon the fact that the coil of pipe was permitted by the defendant to be placed in the salvage yard of Mr. Frank Powser. Neither is the appellee's claim based upon the act of loading such coil of pipe upon the truck operated by appellee; neither is the appellee's claim based upon the act of pounding the coil of pipe with a sledge hammer resulting in its bursting. If there was any negligence on the part of the appellant's employees it occurred at or prior to the time that the coil of pipe was delivered to Mr. Frank Powser. Such acts of negligence if they occurred, were the acts of employees who were engaged in extrahazardous occupations during the course of extrahazardous employment. The difference

between the instant case and the suppositious case presented by the dicta in the Weiffenbach decision is obvious indeed; under no circumstances should such dicta be considered as being a conclusion of the legal question presented in the case at bar.

Whatever force the Weiffenbach dicta may have had must be considered as having been dissipated in the light of the strong and positive language of the Washington Supreme Court in the case of *Boeing Aircraft Company v. Department of Labor and Industries*, 22 Wn.(2d) 423, wherein the very positive rule was expressed that:

“a workman under the Workmen’s Compensation Act at the time he was injured through the negligence of the employee of another company may not maintain an action against the company, *the negligence of whose employee or employees caused the injury*, where that company had complied with the provisions of the act which affords immunities of suit from such circumstances.” (Emphasis ours)

V. SUMMARY AND CONCLUSION

It is submitted that the following propositions of law are established by the provisions of the Workmen’s Compensation Law of the State of Washington, and the decisions of the Washington Supreme Court herein discussed, as follows:

1. That the Workmen’s Compensation Law of the State of Washington is not merely an employer’s liability act, nor even an ordinary compensation act; it is an industrial insurance act designed to insure *both employees and employers* engaged in extrahaz-

ardous employment and to remove entirely all common-law rights of action and all common-law defenses arising from industrial injuries, with the view of making certain that injured workmen shall receive compensation irrespective of all questions of negligence.

2. In any case where an injury to a workman engaged in extrahazardous employment results, during the course of such employment from the negligence of another employer or his workmen, likewise engaged in extrahazardous employment, the injured workman does not have any right to maintain an action against the offending employer or his workmen, but is confined to his remedy under the Workmen's Compensation Law.

3. That the determinative test in each case is not where the injury occurred, or necessarily when the injury occurred, but rather *by whose negligence was the injury caused*. If it was caused by the negligence of an employer, engaged in extrahazardous employment, or by his workmen so engaged, then the injured workman has no common-law right and no statutory right to proceed against the offending employer.

4. In such case the injured workman is entitled to and is confined to the benefits afforded by the Workmen's Compensation Law of the State of Washington. The appellee, with whose misfortune everyone must be most sympathetic, is entitled to receive from the industrial insurance fund the benefits which can be granted under the Workmen's Compensation Act. However, to permit the appellee to maintain this

action against the appellant would do violence to the express provisions of the statute, and the whole theory underlying the system of industrial insurance of the State of Washington.

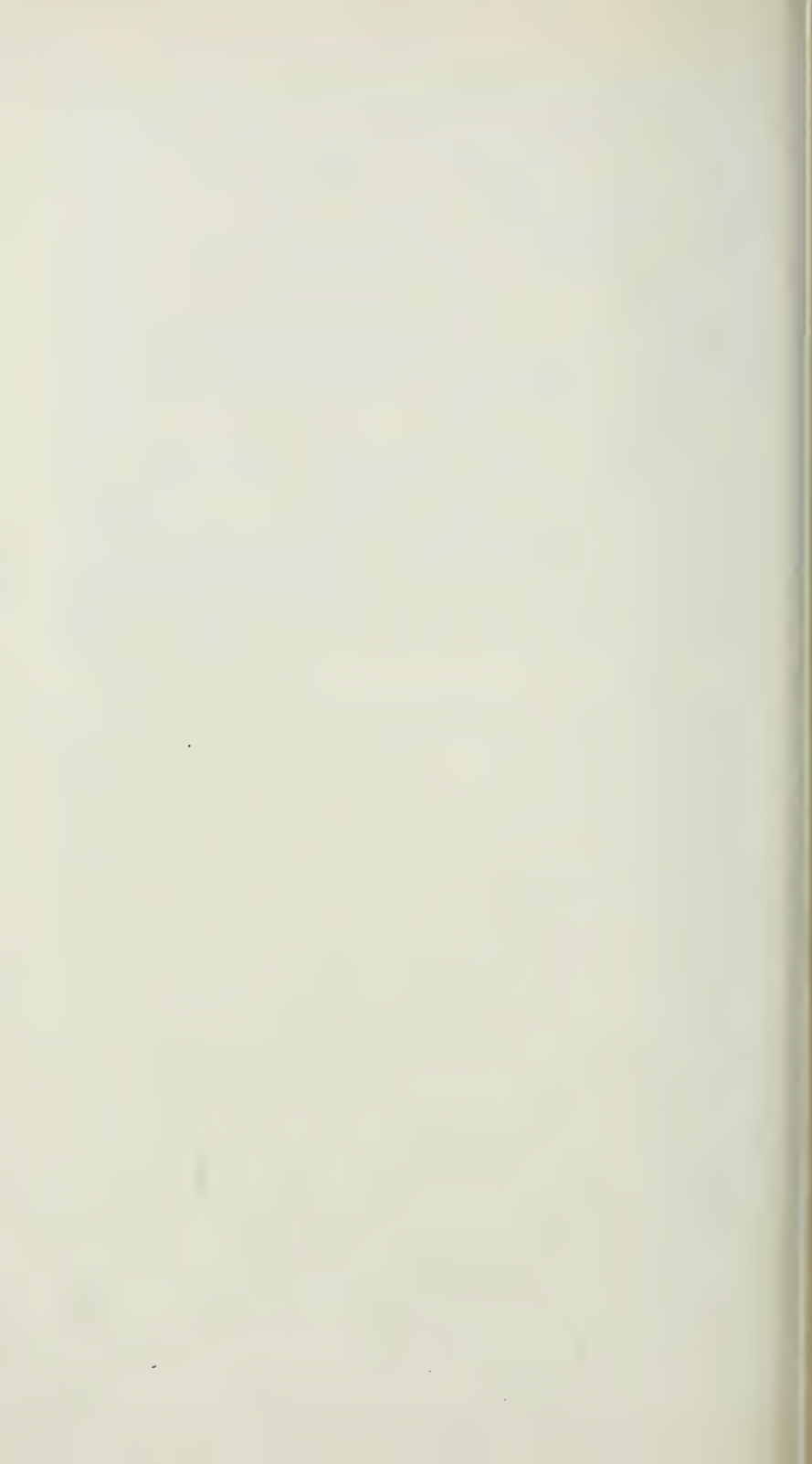
It is submitted that the judgment of the District Court should be reversed, and that the cause should be remanded for a new trial wherein the appellant would be permitted to prove the allegations of its first affirmative answer.

Respectfully submitted,

FRANK M. PRESTON,

PRESTON, THORGRIMSON & HOROWITZ,

Attorneys for Appellant.



APPENDIX

Remington's Revised Statutes of Washington, Section 7674 provides as follows:

"§7674. Extrahazardous employment. There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term 'extrahazardous' wherever used in this act, to wit:

"Factories, mills and workshops where machinery is used; printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gasworks, waterworks, reduction-works, breweries, elevators, wharves, docks, dredges, smelters, powder-works; laundries operated by power; quarries; engineering works; logging, lumbering, and shipbuilding operations; logging, street and interurban railroads; buildings being constructed, repaired, moved or demolished; telegraph, telephone, electric light or power plants or lines, steam-heating or power plants, steamboats, tugs, ferries and railroads, general warehouse and storage; transfer, drayage and hauling; warehousing, and transfer; fruit warehouse and packing-houses. If there be or arise any extrahazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established, shall be, until fixed by legislation, determined by the department here-

inafter created, upon the basis of the relation which the risk involved bears to the risk classified in section 7676; Provided, however, the following operations shall not be deemed extrahazardous within the meaning, or be included in the enumeration, of this section to wit: using power-driven coffee-grinders in wholesale or retail grocery stores; using power-driven washing-machines, in establishments selling washing-machines at retail; using power-driven machinery in shoe repair-shops; using computing machines in offices; using power-driven taffy-pullers in retail candy stores; using power-driven milkshakers in establishments operating soda fountains; the duties of employees in restaurants; using power-driven hair-cutters in barbershops; using power-driven machinery in beauty parlors; using power-driven machinery in optical stores; driving automobiles, exclusive of trucks mentioned in class 11-1 of section 7676 of Remington's 1927 Supplement.

"The director of labor and industries through and by means of the division of industrial insurance shall have power, after hearing had upon its own motion, or upon the application of any party interested, to declare any occupation or work to be extrahazardous and to be under this act. The director of labor and industries shall fix the time and place of such hearing and shall cause notice thereof to be published once at least ten days before the hearing in at least one daily newspaper of general circulation, published and circulated in each city of the first class of this state. No defect or inaccuracy in such notice or in the publication thereof shall invalidate any order issued by the director of labor and industries after hearing had. Any person affected shall

have the right to appear and be heard at any such hearing. Any order, finding or decision of the director of labor and industries made and entered under the foregoing provisions of this act shall be subject to review within the time and in the manner specified in section 7697, and not otherwise. (L. '27, p. 813, §1. Cf. L. '21, p. 719, §1; L. '19, p. 340, §1; L. '11, p. 346, §2.)"

**In The United States Court of Appeals
For the Ninth Circuit**

PENNSYLVANIA SALT MFG. CO., of Washington, a
corporation, *Appellant,*
— VS. —
OSCAR VIRGIL HAYNES, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF OF APPELLEE

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No. 12499

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APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF OF APPELLEE

I. STATEMENT OF JURISDICTION

The appellee hereby refers to the Statement of Jurisdiction beginning on page 1 of the Brief of Appellant in this case, and by this reference incorporates the said Statement of Jurisdiction herein as though it were fully set out herein.

II. STATEMENT OF THE CASE

(a) Pleadings

The Statement of the Case set out in the Brief of Appellant beginning at page 2 thereof and ending at page 9, includes almost all of the essential facts involved in the case at bar. There is one very glaring omission of fact, the inclusion of which is absolutely necessary to a proper decision of the case. In addition to the facts included in the appellant's Statement of the Case, the complaint of the appellee alleged that the coil of pipe sold to Frank Powser (R. 5) had been

discarded from the operating system of the appellant (R. 1). Appellant also omitted from its Statement of the Case that it had admitted in its answer that the coil of pipe in question had been discarded from the operating system of the appellant. The fact that the said coil of pipe had been abandoned at the time of the accident as a part of the industrial operation of the appellant, is a key fact in the case. It should, therefore, be brought to this court's attention that it was a fact which was mutually admitted in the pleadings of the parties hereto.

(b) Evidence

Appellant's statement that there was no substantial controversy in the evidence adduced at the trial as to the manner in which the accident occurred and that there was no substantial controversy that the appellee's vision had been impaired is accurate. However, in summarizing the possibility of the future recovery of the appellee, the appellant in its Statement of the Case neglected to mention that it was conjectural whether appellee's eyesight would be restored to within five or ten per cent of normalcy, inasmuch as statistics showed that surgical operations such as appellee would require to improve his vision are successful in only 50 per cent of the cases in which they have been tried (R.127). Nor did the appellant include the fact that the evidence was clear at the time of the trial that the appellee was classed as industrially blind (R. 121), and that, while appellee might be employable in the future, the type of employment open to him would necessarily be restricted (R. 129).

Appellant stated on page 8 of its brief that the evidence was undisputed that the coil of pipe which was involved in the accident had been retained by appellant as a spare piece of equipment available for use in the event that it became necessary; that it had not been discarded or abandoned as part of the plant equipment until the day that the decision was made to sell it. Appellant's statement is open to question in view of the testimony of appellant's assistant superintendent, Edward Cliffe, who testified that the coil of pipe was in the appellant's scrap pile when he returned from the army (R. 144), which he later stated was in December, 1945 (R. 149).

An additional fact which was brought out by the evidence and which should be called to this court's attention, is that the district court found as a matter of law that the appellee made a valid election to sue the appellant under the Industrial Insurance Act of the State of Washington rather than to take the schedule of payments provided for under the Industrial Insurance Act (R. 274). Such election was not disputed by appellant.

(c) The Verdict

The case was submitted to the jury upon the issues of appellant's negligence, appellee's contributory negligence, and appellee's injuries. The jury returned a verdict in favor of appellee in the sum of \$35,000.00, and judgment was entered in accordance with it.

(d) The Question Involved

The sole question presented to this court for re-

view is whether under the undisputed facts admitted in the pleadings and adduced as evidence, it could be found as a matter of law that the appellant company, at the time of the accident involved, was not, with respect to the coil of pipe involved, in the course of extrahazardous employment under the Workmen's Compensation Laws of the State of Washington. If so, appellee had the right under the said Workmen's Compensation Law to maintain this action against appellant and the action of the district court in (1) striking the first affirmative defense of the appellant's answer, (2) sustaining the appellee's objection to appellant's offer of proof of facts in support of its first affirmative defense, (3) refusing to direct the jury to return a verdict in favor of the appellant, and (4) denying appellant's motion for a new trial of the issue raised by appellant's first affirmative defense, must be affirmed.

III. THE ARGUMENT

(a) Summary Statement of Appellee's Position

The appellee had the right to maintain this action under the Workmen's Compensation Law of the State of Washington because the appellant company under the undisputed facts admitted in the pleadings and brought out in the evidence could not possibly have been in the course of any extrahazardous employment with respect to the coil of pipe in question at the time of the accident, inasmuch as appellant had discarded and abandoned the pipe some time before the accident occurred. Appellee contends that an article which has been sold and delivered by a manufacturer

to a buyer can no longer be considered as a part of the extrahazardous employment of the manufacturer and that the liability stemming from the defective and dangerous condition of the article sold is not such a liability against which the manufacturer is immunized by the laws of the State of Washington. The express provision of the Washington statute specifically supports the contention of the appellee.

(b) The Statutes Involved

Remington's Revised Statutes of Washington, Section 7675, which is set out in full in the Appendix on page 25, is the only statute which is involved in this case.

(c) Discussion of Authorities

Appellee brought this action under Remington's Revised Statutes of Washington, Section 7675, which in the portion relevant hereto, provides:

“. . . That if the injury to the workman is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section . . .”

The appellee was injured due to the negligence of the appellant, Pennsylvania Salt Manufacturing Co. of Washington, by whom he was not employed. Therefore appellee having qualified to do so, elected to sue the appellant in this action as a third party.

The appellant sought to draw over itself a mantle of immunity from suit in this third party action under the Workmen's Compensation Act of the State of Washington, by alleging that the appellee was a workman covered by Washington's Workmen's Compensation Act, that appellant was an employer covered by the same Act, and that at the time of the accident complained of by the appellee, the appellant was in the course of extrahazardous employment under the Act.

Appellant's effort to avoid appellee's suit brings within the scope of this court's inquiry the interpretation of the following clause of Remington's Revised Statutes of Washington, Section 7675, which in the text of the statute immediately follows the portion cited on page 5 hereof, and the application of the said clause to the facts of this case:

“. . . Provided, however, That no action may be brought against any employer or any workman under this act as a third person if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under this act . . .”

As stated by appellant in its brief, the interpretation of the last quoted clause of Remington's Revised Statutes of Washington, Section 7675, is determinative of the issue involved in this case.

The above proviso has been interpreted by the Supreme Court of the State of Washington several times since its passage by the legislature as a law of Washington in 1929.

The first opportunity the Supreme Court of Wash-

ington had to construe the above proviso of Remington's Revised Statutes of Washington, Section 7675, dealing with third party actions was in *Robinson v. McHugh*, 158 Wash. 157, 291 Pac. 330. In that case a third party-employer who was a contributor to the Industrial Insurance Act was held not subject to suit by an injured workman, because at the time of the accident the third party-employer was engaged in the extrahazardous activity of moving machinery. The defendant-employer was actually moving a heavy gasoline shovel which struck a light post, knocking it, and a ladder which plaintiff had placed against it and ascended, to the ground. The statutorily classified extrahazardous act of moving machinery was the very one which caused the injury and that extrahazardous act took place *at the time of the accident*. Therefore, it followed that the third party-employer qualified under the proviso immunizing him from suit. *Denning v. Quist*, 160 Wash. 681, 296 Pac. 145, presented facts which brought into play exactly the same legal principles as those in *Robinson v. McHugh*, *supra*, and therefore resulted in a similar decision. In the *Denning* case, the plaintiff, who was a workman employed by a subcontractor on a construction project in which the defendants were the general contractors, was injured on a hoist built and operated by the defendants for the purpose of lifting building materials to the upper stories of the project then under construction. The Supreme Court of Washington held that no third party action lay, because the commission of the alleged wrong took place *at the time of the accident* when defendant was engaged in extrahazardous employ-

ment under the Act, namely, that of constructing buildings.

The facts in both the *Robinson* and *Denning* cases, *supra*, fell squarely within the terms of the proviso. The third party-defendants committed the very acts alleged to have been the negligent ones *simultaneously* with the accident and in the course of extrahazardous employment.

The Supreme Court of Washington next construed the proviso, hereinabove cited, in *O'Brien v. Northern Pacific Railroad Company*, 192 Wash. 55, 72 P.(2d) 602, in which case it laid down the rule that a third party-employer, to qualify under the proviso precluding a third-party suit against him, had not only to be engaged in extrahazardous employment, but such third party-employer had also to be amenable to the Act, and to be a contributor to the accident fund. In the *O'Brien* case a third party action was held to be a proper remedy, as the third party-employer, being engaged as a railroad in interstate commerce, an extrahazardous employment, was not amenable to the Act, did not contribute to the accident fund under the Act, and therefore was not entitled to the benefits of the Act. The case of *Reeder v. Crewes*, 199 Wash. 40, 90P.(2d) 267, following logically the holding in *O'Brien v. Northern Pacific Railroad Company*, *supra*, held that an injured workman under the Act could sue an employer engaged in extrahazardous employment under the Act at the time of the accident as a third party, if the employer was in default in making payments or in making reports under the Act.

It is stated in *Gephart v. Stout*, 11 Wn.(2d) 184, 118 P.(2d) 801, with reference to the *O'Brien* and *Reeder* cases, *supra*, that:

“The two last mentioned cases establish the rule that a third party-employer who does not contribute to the industrial insurance fund is subject to suit by a workman, but it does not follow that such an employer who does contribute to the fund is immune.”

Pryor v. Safeway Stores, Inc., 196 Wash. 382, 83 P.(2d) 1045, was a case in which the roadsweeper of the plaintiff, who was a workman engaged in extrahazardous employment was run into by a truck negligently driven by an employee of a third party-employer. The third party-employer, although not engaged in extrahazardous employment, had brought itself under the Industrial Insurance Act by the elective adoption provisions thereof, and was in good standing thereunder. The Supreme Court of Washington, in denying the third party-employer immunity from a suit under the Act stated:

“Plainly, under this limitation an employer under the Act, under the compulsory or elective provisions, is immune from an action in damages for negligent injury of a workman not in his employ only when, ‘at the time of the accident’ such employer is engaged in ‘extrahazardous employment.’

“Since at the time of the collision, the appellants were not engaged in extrahazardous employment, respondent had the right to elect whether he would take compensation under the Industrial Insurance Act or maintain this action for negligence against appellant.”

The above quotation from the *Pryor* case, *supra*, forcibly demonstrates that the fact that an employer contributes compulsorily to the Industrial Insurance Fund under the Act is but a condition of immunity from a third party action. There are other required conditions which must also be simultaneously fulfilled so that immunity will be achieved.

It becomes exceedingly clear that for an employer to escape a third party action, it is not enough that he merely be amenable to the Act and not in default thereunder. Following the words of the Supreme Court of Washington, it must also appear that an employer, even under the compulsory provisions, must show that at the time of the accident he was engaged in extrahazardous employment.

Weiffenbach v. Seattle, 193 Wash. 528, 76 P.(2d) 589, presented the following facts: The plaintiff was employed by the Seattle Cornice Works in making estimates and surveying buildings for repair. While engaged in measuring the roof of a building, he was permanently injured by a current of electricity conveyed by a metal tape measure used by him, from a high voltage wire, part of the defendant city's municipal light and power system. The high voltage wire was uninsulated and had negligently been allowed to sag down close to the roof. The plaintiff sued the defendant city as a third party to recover damages.

The sole issue in the case was whether or not the defendant city was in the scope of extrahazardous employment under the Workmen's Compensation Act in respect to the maintenance of the high voltage line causing the accident. In holding that the defendant

city was exempt from suit for the reason that the high voltage transmission line was an integral, existing part of an extrahazardous occupation which the city was carrying on, the Supreme Court of Washington said:

“Assuming that an employer was engaged in transporting some product, as coal or ore, over a long stretch of tramway, in cars drawn by cables moving from a central plant, and that, in the operation, a workman in another extrahazardous employ was injured, could it be said that, as to this operation the employer was not engaged in employment because no workman of the employer was, at the time, engaged in the operation outside the central plant? *If the city had abandoned the use of the wire for the transmission of electricity so that it was no longer performing any function as a part of its operating system, then, of course, it would be a mere condition within the principle contended for by the appellant (plaintiff). It would be then no longer a part of the industry or the extrahazardous employment in which the respondent (defendant) was engaged.*” (Italics ours)

The italicized portion of the above quotation from the *Weiffenbach* case, *supra*, fits the instant case exactly.

Attention is called to the fact that in the *Weiffenbach* case, *supra*, the Supreme Court of Washington pointed out that the word *employment* used in the proviso here under discussion is synonymous with *industry*.

Assuming in the instant case that the appellant was a compulsory employer under the Act and not in de-

fault thereunder, the issue in the instant case, like that in the *Weiffenbach* case, *supra*, would be, as stated in the Statement of the Question Involved, simply this: Was the appellant, at the time of the accident, in the course of any extrahazardous employment under the Act?

Appellee's injuries, as shown by the undisputed evidence, were due to burns from sulphuric acid which was loosed from a coil of pipe which the appellant company had sold as scrap iron and which had by such sale been introduced into the stream of commerce (R. 74-85). At the time of the accident—which is the critical point of time insofar as the determination of whether the appellant is to be granted exemption from third party suit under the Act—the coil of pipe containing sulphuric acid had, through the sale, been discarded for some period of time by the appellant (R. 74-85). The appellant admitted that the pipe had been sold prior to the accident, to one Frank Powser as scrap iron and was, insofar as the appellant was concerned, no longer a part of its manufacturing plant (R. 10). Can it then be said that the coil of pipe was part of the extrahazardous employment or industry of the appellant after the appellant had sold and discarded it? Appellee submits that when the appellant sold the coil of pipe to Frank Powser, the pipe was no longer performing a function as a part of appellant's manufacturing system; it was no longer a part of the extrahazardous employment or industry of the appellant.

The statutory proviso here in question sets up the *time of the accident* as the crucial period during which

the third party-employer must be engaged in extra-hazardous employment in order to be shielded from a third party action. It is not enough to prove that he was engaged in extrahazardous employment at some other time, or at some other place not connected with the accident.

The Supreme Court of Washington considered the meaning of the word *accident* in *Johnson v. Department of Labor and Industries*, 132 Wash. Dec. 394, 205 P.(2d) 896. It said:

“See *Stolp v. Department of Labor and Industries*, 138 Wash. 685, 245 Pac. 20, where it was said: ‘The accident or fortuitous event happened at the time the respondent struck his eye upon the air compressor pipe. That was the event. The injury which was the result of that accident or event was when the effect was produced and the sight of the eye lost’.”

Consequently, in the instant case the *time of the accident* was when the sulphuric acid struck the appellee. It would follow that appellant, to have successfully achieved the immunity to which it claimed to be entitled, had to show that on February 20, 1948, when the accident on which appellee based his action occurred (R. 4, 11, 91) the coil of pipe was being used in appellant’s extrahazardous employment. That was a patent impossibility, under the pleadings and under the evidence, inasmuch as appellant admitted that *at the time of the accident* the pipe had been sold and delivered to Frank Powser and was therefore no longer a part of the industry in which appellant was engaged (R. 11, 148). As far as the appellant was concerned, its only relationship to the acid-laden coil of

pipe was that of a vendor of an item of personal property. The appellant had neither title, nor the right to possession, nor actual possession thereof. The appellant had, prior to the accident, introduced the scrap pipe into those channels of business and commercial intercourse into which scrap iron passed when it no longer had use in the industry in which the appellant was engaged. The pipe's relationship to the appellant was no longer industrial; the relationship became, by reason of the sale, purely commercial.

The appellant as the vendor of the coil of pipe then became subject to liability for the dangerous condition of the pipe. This liability sprang from the fact that appellant was a supplier of a chattel. It is completely divorced from the industrial employment of the appellant and is a liability which was created only when the appellant undertook to sell the coil of pipe.

The situation created under the facts of the instant case is analogous to that which was discussed in the landmark case of *McPherson v. Buick Motor Company*, 217 N.Y. 382, 111 N.E. 1050, Ann. Cas. 1916 C, 440, L.R.A. 1916 F, 696, where a manufacturer was held liable to a party who was not its immediate vendee for injuries resulting from the collapse of a defective wheel of an automobile manufactured by it. It is clear that with respect to such an automobile the extrahazardous employment of the manufacturer would cease when it sold the automobile to other parties. It would no longer be a part of the industry of the manufacturer. The manufacturer would owe certain duties to users of the automobile but they would be duties arising from its being a sup-

plier of chattels in a commercial capacity, the manufacturer's industrial connection with the automobile having terminated upon its sale.

If, for example, a manufacturer of matches under the Act, negligently sold defectively made matches to a wholesaler, who in turn sold them to a retailer, who sold them to an employer of a workman under the Act, which workman in the course of his employment struck the match and was injured by the ensuing explosion resulting from the defective manufacture, it becomes quite apparent that insofar as the manufacturer is concerned, the accident was occasioned not in the industrial activity of the manufacturer but in its commercial activity subsequent to the completion of the industrial activity.

The situation is the same here. The appellant is attempting in the instant case to widen the benefits of the Workmen's Compensation Act of the State of Washington to include immunity from liability for its supplying defective chattels. That certainly was not within the contemplation of the legislature of the State of Washington when it enacted its Industrial Insurance Act and subsequent amendments. Liability for products sold is entirely separable from the industrial activity of the manufacturer. To extend the immunity, as contended by appellant, would do violence to the intention of the legislature as expressed in definite terms in the proviso herein under discussion.

Appellant iterates and reiterates that an employer who has complied with the provisions of the Industrial Insurance Act is as a matter of policy entitled to all

of the benefits of the Act. That is indisputable. Appellant errs, however, in assuming that complete immunity from third party suits is granted such an employer as long as it was at the time of the *negligence* engaged in extrahazardous employment. The Act is specific in the terms granting immunity from third party suits; it says that such a benefit will accrue only when *at the time of the accident* the employer was in the course of extrahazardous employment under the Act. It must be presumed from the words of the proviso that the legislature contemplated such a state of facts as are presented in the instant case and was cognizant that industrial activity, with respect to a chattel, ceases when a product is sold and delivered.

Appellant further assumes that the determinative test in each case is not when the accident occurred but when the negligence giving rise to the accident occurred. In the light of the plain wording of the proviso, the only point of time in issue is *the time of the accident*. To sustain the contention of the appellant, the plain words and meaning of the Washington statute must be disregarded. Appellant would have the courts rewrite the proviso in order to widen the benefits and thus pull over itself the mantle of immunity from third party suits in cases of products liability.

Properly analyzed the allegations of negligence of the appellee (R. 7) charge appellant with supplying an inherently dangerous chattel to other persons not cognizant of the danger.

In the instant case the pipe had been sold by the appellant and no longer remained in its hands and therefore could not be considered with respect to it a

part of the industry in which it was engaged. When the coil of pipe was abandoned by sale by the appellant, it was no longer a part of the manufacturing industry and with respect to it the appellant was not in the course of any extrahazardous employment under the Act.

That the *Weiffenbach* case, *supra*, states the correct law of the State of Washington with respect to the point at issue, was established in the very well reasoned case of *Gephart v. Stout*, *supra*. In the *Gephart* case, the plaintiff making deliveries by motorcycle was engaged in extrahazardous employment under the Act at the time of the injury. The defendant was the owner of a freight transportation business, also classified as extrahazardous. The defendant's automobile collided with the plaintiff's motorcycle, causing him the injuries, compensation for which was sought in the action. The Supreme Court of Washington reviewed the cases hereinbefore cited, and in holding in favor of the plaintiff (respondent) stated:

"While the foregoing cases are not directly in point, they do clearly establish two essential requirements which an employer must meet to entitle him to immunity from suit by a workman not in his employ: (1) The employer must be a contributor to the workmen's compensation fund; and (2) *at the time of the accident*, the employer must be in the course of some extrahazardous employment under the industrial insurance act. To satisfy the second requirement, the negligent act or omission which is the basis of the workman's cause of action must arise out of, or be in some way connected with, an extrahazardous employment or business *then* being carried on by

the employer. We do not think the legislature intended, by the statutory proviso in question, to grant to every individual who may happen to own an extrahazardous business or a business having some extrahazardous phase, a blanket immunity from suit as a third party employer for his personal negligence at all times, in all places, and in connection with all activities in which he may engage.

“In the present case, the appellant was not in the course of any extrahazardous employment at the time of the accident. The respondent, therefore, had the right, as he elected to do, to seek his remedy by suit against appellant rather than take the benefits provided by the workmen’s compensation act.” (*Italics ours*)

A significant act of the Supreme Court of Washington in its *Gephart* decision was that it quoted the following excerpt from the *Weiffenbach* case and the court italicized those portions here italicized:

“Assuming that an employer was engaged in transporting some product, as coal or ore, over a long stretch of tramway, in cars drawn by cables moving from a central plant, and that, in the operation, a workman in another extrahazardous employ was injured, could it be said that, as to this operation, the employer was not engaged in employment because no workman of the employer was, at the time, engaged in the operation outside the central plant? *If the city had abandoned the use of wire for the transmission of electricity so that it was no longer performing any function as a part of its operating system, then, of course it would be a mere condition within the principle contended for by the appellant (plaintiff). It would be then no longer*

a part of the industry or the extrahazardous employment in which the respondent (defendant) was engaged."

Another portion of the *Gephart* case reads as follows:

"In *Lunday v. Department of Labor and Industries*, 200 Wash. 620, 94 P.(2d) 744, the plaintiff claimed a widow's pension under the workmen's compensation act, and the principal question was whether or not her husband was a workman within the meaning of the act. He had been working as a grocery clerk, not an extrahazardous employment, but part of his time was spent assisting in making deliveries for his employer. He was fatally injured at the end of a trip on a delivery truck which carried both meat and groceries. Because of certain circumstances of that case, which we shall not detail here, the delivery of meat was considered to come within the extrahazardous category, and it was held that, in the particular time of the accident, both he and his employer were engaged in extrahazardous employment. The implication of the decision is that both employer and employee may be subject to the act as to one extrahazardous phase of a business, but not subject to it as to another nonextrahazardous phase of the same business."

The appellant in its brief glosses over the words of the Supreme Court of the State of Washington in the case of *Weiffenbach v. Seattle*, *supra*, when the court was contemplating a situation exactly as presented by the case at bar. The statement of the Washington court is clear and explicit. It is not an off-hand statement as is evidenced by the fact that in the case of *Gephart v. Stout*, *supra*, the Washington court re-

affirmed its statement in the *Weiffenbach* case by italicizing the following words:

“* * * *If the city had abandoned the use of the wire for the transmission of electricity so that it was no longer performing any function as a part of its operating system, then of coures it would be a mere condition within the principle contended for by the appellant (plaintiff). It would be then no longer a part of the industry or extrahazardous employment in which the respondent (defendant) was engaged.*”

Then appellant attempts to draw a distinction between the negligence of a city in allowing a dangerous condition to exist with regard to a piece of wire abandoned as a part of the city's lighting system and the negligence of the appellant in creating a dangerous condition and allowing it to exist by injecting into regular commercial channels a coil of pipe which appellant had sold and discarded as a part of its industrial operation. There is no difference. To attempt to create one is sheer sophistry. The situation is exactly the same.

Appellant on page 31 of its brief stated that the force of the *Weiffenbach* case, *supra*, must be considered as having been dissipated by the language of the Washington Supreme Court in the case of *Boeing Aircraft Company v. Department of Labor and Industries*, 22 Wn.(2d) 423, 156 P.(2d) 640. The statement is erroneous and the quotation is misleading for the reason that the full text thereof was not included. It should be read with the fuller quotation appearing on page 18 of appellant's brief. In the quota-

tions cited by the appellant the Washington Supreme Court was not concerned with an interpretation of the proviso under discussion here. It was solely concerned with the problem of determining which of two industries contributing to the Industrial Accident Fund would absorb the charges for losses due to an accident which was unquestionably an industrial accident. The Washington court merely stated that a contributor to the Industrial Insurance Fund is entitled to all the benefits conferred by the statute. The question of whether immunity from suit existed under circumstances like those of the instant case was not before the court.

In *Burns v. Johns*, 125 Wash. 387, 216 Pac. 2, the Washington Supreme Court said:

“The right of election is a valuable right to the workman and, to secure it to him, the act should receive the same liberal construction that is required to be given to other parts of the act in order to secure his rights thereunder.”

IV. SUMMARY AND CONCLUSION

Appellee respectfully submits that the provisions of the Workmen's Compensation Law of the State of Washington specifically establish and the decisions of the Supreme Court of Washington consistently reaffirm the following propositions of law:

1. That a workman engaged in extrahazardous employment who is injured due to the negligence of another employer, who is covered by the Act, has the right to elect whether to sue the other employer, unless *at the time of the accident* the other employer was in

the court of extrahazardous employment under the Act.

2. That *the time of the accident* is the moment at which the fortuitous event resulting in injury occurred and is different and distinct from the time of the negligence.

3. That when an employer has discarded or abandoned a chattel or a piece of equipment, the said chattel or piece of equipment can no longer be said to be a part of the extrahazardous employment of the employer.

4. That a workman engaged in extrahazardous employment, who is injured due to the inherently dangerous nature of a chattel which another employer covered by the Act had discarded and sold to other parties prior to the time of the accident, has the right of electing whether to take under the schedule of payments provided by the Act or to sue the other employer as a third party under the terms of the Act. The reason for allowing such election is that the offending chattel at the time of the accident could not possibly, after sale, be considered part of the extrahazardous employment of the employer.

Therefore, appellee respectfully submits that acts of the District Court in (1) striking the first affirmative defense of the appellant's answer (2) sustaining the appellee's objection to appellant's offer of proof of facts in support of its first affirmative defense (3) refusing to direct the jury to return a verdict in favor of the appellant, and (4) denying appellant's motion for a new trial of the issue raised by appellant's first

affirmative defense should be upheld and the judgment of the District Court affirmed.

Respectfully submitted,

MASLAN, MASLAN & HANAN,

Attorneys for Appellee.

APPENDIX

Remington's Revised Statutes of the State of Washington, Section 7675, provides as follows:

"In the sense of this act words employed means as here stated, to-wit:

"Factories mean undertakings in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and plant of the concern, except when otherwise expressly stated.

"Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control, except when otherwise expressly stated.

"Mill means any plant, premises, room or place wherein machinery is used, any process of machinery, changing, altering or repairing any article or commodity for sale or otherwise, together with the yards and premises which are a part of the plant, including elevators, warehouses and bunkers, except when otherwise expressly stated.

"Mine means any mine where coal, clay, or mineral, gypsum or rock is dug or mined underground.

"Quarry means an open cut from which coal is mined, or clay, ore, mineral, gypsum, sand, gravel or rock is cut or taken for manufacturing, building or construction purposes.

“Engineering work means any work of construction, improvement or alteration or repair of buildings, structures, street, highways, sewers, street railways, railroads, logging roads, interurban railroads, harbors, docks, canals, electric, steam or water power plants, telegraph and telephone plants and lines, electric light or power lines, and includes any other works for the construction, alteration or repair of which machinery driven by mechanical power is used, except when otherwise expressly stated.

“Except when otherwise expressly stated, employer means any person, body of persons, corporate or otherwise, and the legal personal representatives of a deceased employer, all while engaged in this state in any extrahazardous work, by way of trade or business, or contracts with one or more workmen, the essence of which is the personal labor of such workman or workmen, in extrahazardous work.

“Workman means every person in this state, who is engaged in the employment of any employer coming under this act whether by way of manual labor or otherwise, in the course of his employment: *Provided, however,* That if the injury to a workman is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he takes under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall

contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensations provided or estimated by this act for such case: *Provided, however,* That no action may be brought against any employer or any workman under this act as a third person if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under this act. Any such cause of action assigned to the state may be prosecuted or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.

“Any individual employer or any member or officer of any corporate employer who shall be carried upon the payroll at a salary or wage not less than the average salary or wage named in such payroll and who shall be injured, shall be entitled to the benefit of this act as and under the same circumstances, and subject to the same obligations, as a workman: *Provided,* That no such employer or the beneficiaries or dependents of such employer shall be entitled to benefits under this act unless the director of labor and industries prior to the date of the injury has received notice in writing of the fact that such employer is being carried upon the payroll prior to the date of the injury as the result of which claims for a compensation are made.

“Dependent means any of the following named relatives of a workman whose death results from any injury, and who leave surviving no widow, widower, or child under the age of eighteen years,

viz.: Invalid child, father, mother, grandfather, grandmother, stepfather, stepmother, grandson, granddaughter, brother, sister, half-sister, half-brother, niece, nephew, who at the time of the accident are actually and necessarily dependent in whole or in part for their support upon the earnings of the workman. Except where otherwise provided by treaty, aliens other than father or mother, not residing within the United States at the time of the accident are not included. A dependent shall at all times furnish to the director of labor and industries proof satisfactory to the director of labor and industries of the nature, amount and extent of the contribution made by such deceased workman.

“Beneficiary means a husband, wife, child or dependent of a workman in whom shall vest a right to receive payment under this act.

“Invalid means one who is physically or mentally incapacitated from earning.

“The word ‘child’ as used in this act, includes a posthumous child, stepchild, a child legally adopted prior to the injury and an illegitimate child legitimated prior to the injury.

“The word ‘injury’ as used in this act means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical condition as results therefrom.

“The term ‘educational standard’ shall mean such standards as the supervisor of safety shall make for the purpose of educating and training both employer and workman in the appreciation and avoidance of danger, and in the maintenance and proper use of safe place and safety device standards.”

In The United States Court of Appeals
For the Ninth Circuit

PENNSYLVANIA SALT MFG. CO., of Washington, a
corporation, *Appellant,*

— vs. —

OSCAR VIRGIL HAYNES, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

PETITION FOR REHEARING

FILED

OCT 17 1950

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In The United States Court of Appeals
For the Ninth Circuit

PENNSYLVANIA SALT MFG. CO., of Wash-
ington, a corporation, *Appellant,*

vs.

OSCAR VIRGIL HAYNES, *Appellee.*

No. 12499

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

PETITION FOR REHEARING

*To the United States Court of Appeals for the Ninth
Circuit and to the Honorable Judges Thereof:*

Comes now Pennsylvania Salt Mfg. Co. of Wash-
ington, a corporation, the appellant in the above en-
titled cause, and presents this, its petition for rehear-
ing in the above entitled cause, and in support thereof
respectfully shows:

I. Statement of basic grounds of petition for rehearing.

The opinion of the court filed therein on Septem-
ber 18, 1950, holds in effect that the immunity from
suit contained in the following proviso of the Indus-
trial Insurance Act of the State of Washington (Rem.
Rev. Stat., Sec. 7675):

“Provided, however, that no action may be
brought against any employer or any workman
under this act as a third person if at the time
of the accident such employer or such workman

was in the course of any extrahazardous employment under this act”

is not applicable to the state of facts presented in the case at bar for the reason that the accident which caused the injury did not occur at the same time as the negligence causing the accident, although the opinion recognizes the connection between the plaintiff's injury and the defendant's extrahazardous employment. The opinion of the court rests upon the conclusion that because the connection between the plaintiff's injury and the defendant's extrahazardous employment was not temporal, the defendant is not within the immunity provision above quoted.

It is submitted that this conclusion effectually overrules the decisions of the Washington State Supreme Court and is directly in conflict with the underlying purpose and theory of the industrial insurance system of the State of Washington as expressed in the decisions of the Washington Supreme Court.

II. Where injury is result of negligence occurring during extrahazardous employment, immunity applies.

As stated by the Washington Supreme Court in *Gephart v. Stout*, 11 Wn.(2d) 184, 118 P.(2d) 801, in order to qualify for the immunity afforded by the statutory proviso, the employer must be in the course of some extrahazardous employment under the Industrial Insurance Act at the time of the accident, and that this requirement will be satisfied if the negligent act or omission which is the basis of the workman's cause of action arises out of, or in some

way connected with, an extrahazardous employment or business then being carried on by the employer.

In each of the cases where it appeared that the defendant was a contributor to the industrial insurance fund and in which immunity was denied under the proviso, the negligence which caused the injury was negligence which did not occur in any extrahazardous operation or activity of the defendant's business.

In *Pryor v. Safeway Stores, Inc.*, 196 Wash. 382, 83 P.(2d) 241, the negligence of the defendant's servant which caused the plaintiff's injury occurred in the course of a nonhazardous employment.

In *Gephart v. Stout*, *supra*, the negligence of the defendant, which caused the plaintiff's injury, occurred while the defendant was engaged in an activity having no connection with the defendant's extrahazardous business.

The *Pryor* case and the *Gephart* case are the only cases which the Washington court has decided wherein immunity was denied under the proviso in which it appeared that the defendants were contributors to the industrial insurance fund. As stated above, in both of said cases the negligence which caused the injury did not occur in any extrahazardous operation or activity of the defendant's business.

We submit that these cases, together with the cases relied upon in the appellant's brief, clearly illustrate the principle, recognized by the opinion of this court, that where the plaintiff's injury was caused by negligence of the defendant or his employees, occurring

during extrahazardous employment, the statutory immunity will be applied.

III. The dicta in the case of *Weiffenbach v. Seattle*, 193 Wash. 528, 76 P.(2d) 5899, should not be controlling.

The opinion of the court states that the rule stated in the dictum of the Washington Supreme Court in the case of *Weiffenbach v. Seattle*, 193 Wash. 528, 76 P.(2d) 589, is controlling. This dictum is as follows:

“If the city had abandoned the use of the wire for the transmission of electricity so that it was no longer performing a function as a part of its operating system, then, of course, it would be a mere condition within the principle contended for by the appellant. It would be then no longer a part of the industry or the extrahazardous employment in which the respondent was engaged.”

It is submitted that the dictum itself is based upon a completely illogical and untenable premise. The dictum assumes a situation where the city had abandoned the use of wire for the transmission of electricity. If the city had abandoned the use of the wire for the transmission of electricity, *then there could have been no injury*; the plaintiff's injury in the *Weiffenbach* case was caused by coming into contact with a current of electricity which was then passing through the wires of the electric transmission system operated by the city. It is clear then that the suppositional statement upon which the dictum is based has no basis whatsoever. Certainly the court in the *Weiffenbach* case did not mean to say that the immunity afforded by the proviso would not be available to the

city as a defense if the plaintiff had been injured, as he was injured, by contact with electric current after the wire had been abandoned by the city; if electric current was still being transmitted thru the wire, after its abandonment, the negligence would still have occurred during the extrahazardous operation.

It is submitted that this clearly indicates the danger and the futility of deciding one case upon ill-considered and illogical dictum contained in the decision of another case.

It is further submitted that there is no basis in precedent whereby Federal courts are in any manner bound by dicta contained in the decisions of the state courts. Moreover it is axiomatic that not even state courts are bound by the dicta contained in the opinions of such courts.

It is submitted that the dictum in the *Weiffenbach* case should not afford the basis for the decision in the case at bar.

IV. Washington decisions do not restrict application of the immunity proviso to cases where negligence and injury are simultaneous events.

Both the appellant and the appellee in this case have submitted to this court all of the decisions of the Washington Supreme Court wherein the above quoted immunity proviso has been interpreted. It is submitted that in none of these decisions is there any statement that could be reasonably interpreted as setting forth the rule that the negligence of the defendant or his servants in the course of extrahazardous employment and the plaintiff's injury must be simultaneous

events. The opinion of the court in the case at bar is based, as above stated, upon the premise that the connection between the negligent act and the injury must be both causal and temporal. Nowhere in any of the decisions of the Washington court is there any suggestion that the negligence and the accident causing the injury must occur at the same time.

In this respect it is submitted that the opinion of the court is in direct conflict with the underlying purpose and theory of the Industrial Insurance System of the State of Washington as expressed in its decisions, three of which were not referred to in the opinion, although thoroughly discussed in the appellant's brief.

In the case of *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, 158 Pac. 256, the Washington court said:

"Ours is not an employer's liability act. It is not even an ordinary compensation act. It is an industrial insurance statute. Its administrative body is entitled the industrial insurance commission. All the features of an insurance act are present."

Although the opinion of the court considers the controlling rule to be the dictum in the *Weiffenbach* case, the opinion does not consider the statements included in the *Weiffenbach* decision which formed the basis of the court's conclusion therein. It should be remembered that in the *Weiffenbach* case the court held that the city was entitled to the immunity afforded by the statute. This court's attention is again directed to the following language of the court in the *Weiffenbach*

case which states very clearly the fundamental nature of the system of industrial insurance in the State of Washington:

“The wire was an integral part of respondent’s electric system used in the transmission and distribution of its product. It was extrahazardous, defined so by the statute, and respondent was required to, and did, pay into the industrial insurance fund of the state assessments levied upon its payroll as its ratable contribution for the protection, *not of its own employees alone, but of the whole body of employees of the State engaged in extrahazardous industry.* * * *

“The immunity from a suit here involved must have been granted by the 1929 legislature as a reciprocal compensation to industry for the burden it assumes as an aggregate unit in providing, in the language of the statute,

“* * * sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents * * * regardless of questions of fault. * * *’” (Emphasis ours)

Again in *Koreski v. Seattle Hardware Co.*, 17 Wn. (2d) 421, 135 P.(2d) 860, the court repeated the fundamental purpose of the statute in the following language:

“Those who comply with the terms and conditions of the workmen’s compensation act are entitled to all the benefits of the act and subject to all of the liabilities of the Act. *As appellant complied with the terms of the workmen’s compensation act, immunity from liability for negligently injuring respondent, who was the employee of another employer, is a benefit to which*

appellant is entitled under the act." (Emphasis ours)

We would also again submit for the court's consideration the opinion of the court in *Boeing Aircraft Co. v. Department of Labor & Industries*, 22 Wn.(2d) 423, 156 P.(2d) 640, wherein the purpose, policy, and history of the industrial insurance system of the State of Washington is reviewed and certain well defined and well accepted rules are expressed. In said decision at page 434, the court says:

"As stated above, prior to 1927, an employee injured at his employer's plant had no right of action against any third person. From 1927 to 1929, the employee covered by the act, if injured either away from or at the plant, could elect to take under the statute or sue a negligent third party. *Since 1929 an injured employee could sue a negligent third person only if such person was not an employee or employer under the coverage of the statute.* * * *" (Emphasis ours)

"In 1929 the privilege was withdrawn as to other workmen and the employers likewise under the statute. Industry acquired, under the 1929 statute, an immunity from common-law actions with potentially larger damage claims in exchange for its assumption, in the aggregate, of limited responsibility to its employees without fault."

In the same opinion we submit that the Washington Supreme Court sets down the rule which should be decisive of the case at bar. At page 435 the court states:

"Under the workmen's compensation act, all civil causes of action for personal injuries sus-

tained in industrial accident arising out of extra-hazardous employment are abolished except in those cases where the act expressly preserves or creates a right of action; and in all such cases the rights of action are purely statutory, and not common-law rights. *An employer who complies with the terms of the workmen's compensation act is entitled to all of its benefits, including immunity from liability or negligently injuring the employee of another employer. A workman, under the workmen's compensation act at the time he was injured through the negligence of an employee of another company, may not maintain an action against the company the negligence of whose employee or employees caused the injuries, where that company had complied with the provisions of the act which affords immunity from suit in such circumstances.*" (Citing *Koreski v. Seattle Hardware Co.*, *supra*) (Emphasis ours)

The last sentence of the above quoted statement from the *Boeing Aircraft Company* case, we submit, states the most authoritative interpretation of the immunity proviso. This statement is very simple, direct, and to the point. It is to the effect that if a workman under the Workmen's Compensation Act at the time of his injury is injured through the negligence of an employee of another company, which occurs during an extrahazardous operation, he may not maintain an action against the latter company, the negligence of whose employee caused the injury, if that company has complied with the provisions of the Industrial Insurance Act. We submit that no language could be more clear or direct. We submit further that

this statement is certainly a more complete and authoritative expression of the interpretation which the Washington Supreme Court has placed upon the proviso, than is the illogical and inconsistent dictum contained in the *Weiffenbach* case.

We submit that there can be no doubt but that the Pennsylvania Salt Manufacturing Co. was fully covered by the Industrial Insurance Act; being so fully covered, the plaintiff's remedy was against the industrial insurance fund.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted, and that the opinion of this court as endorsed and filed on September 18, 1950, which affirmed the judgment of the United States District Court, Western District of Washington, Northern Division, upon further consideration, be set aside.

Respectfully submitted,

FRANK M. PRESTON,
PRESTON, THORGRIMSON & HOROWITZ,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

We, counsel for the above named petitioner, do hereby certify that the foregoing Petition for Rehearing in this cause is presented in good faith and not for delay.

FRANK M. PRESTON,
PRESTON, THORGRIMSON & HOROWITZ,
Attorneys for Appellant.

